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Diversified Holdings, L.C. v. Gilbert R. Turner, Richard M. Knapp, University Properties, Inc., a Utah Corporation, the Haws Companies, a Utah Corporation, dba the Haws Companies Real Estate Services, Robert M. West, Jr., and John Does 1 through 4 : Brief of Appellee

Utah Supreme Court

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Blake S. Atkin; Atkin & Hawkins; Attorneys for Appellee.

IN THE SUPREME COURT OF THE STATE OF UTAH

DIVERSIFIED HOLDINGS, L.C., Plaintiff, Appellee and Cross-Appellant, v. GILBERT R. TURNER, RICHARD M. KNAPP, UNIVERSITY PROPERTIES, INC., a Utah Corporation, THE HAWS COMPANIES, a Utah Corporation, dba THE HAWS COMPANIES REAL ESTATE SERVICES, ROBERT M. WEST, JR., and JOHN DOES 1 through 4, Defendants, Appellants, and Cross-Appellees.	Supreme Court No. 20000730 Priority No. 15

BRIEF OF APPELLEE/CROSS-APPELLANT

Appeal from a Judgment of the Court Judicial District Court, in and for Utah County,

State of Utah, Honorable James R. Taylor, District Court Judge, presiding

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter pursuant to Utah Code Ann. §78-2-2(j)(2000).

II. STATEMENT OF THE ISSUES RAISED BY THE INITIAL APPEAL

The following issues are presented on the appeal filed by Appellant[1]:

APPELLANTS' ISSUE NO. 1 ("Election of Remedies Issue"):

a) Did the Appellants waive their "Election of Remedies Issue" when Appellants: (1) Not only failed to object but expressly consented to the court instructing the jury that "An integration clause in a contract between the parties does not bar recovery for fraud or negligent misrepresentation"; (2) Appellants' counsel affirmatively represented to the trial court that he would not make the argument that an integration clause bars recovery for fraud; and (3) Appellants have not presented any "special circumstances warranting a review" of the instruction?

Standard of Review: Pursuant to Rule 51 of the Utah Rules of Civil Procedure, no error can be assigned by a party who fails to object to a jury instruction. The appellate court may, in its discretion, however, review the instruction provided appellant demonstrates a persuasive reason for exercising that discretion which requires "showing special circumstances warranting such a review." Utah R. Civ. P. 51; Crookston v. Fire Ins. Exch., 817 P.2d 789, 798-799 (Utah 1991); Williams v. Lloyd, 403 P.2d 166, 167 (Utah 1965).

b) Assuming Appellants did not waive this issue, was it clear error for the trial court to instruct the jury that Diversified could affirm the fraudulently induced contract and recover damages resulting from Appellants' fraud and negligence?

Standard of Review: The review of a jury instruction when objections are not made at trial and properly preserved, is under a "plain error" standard. Plain errors are those that "should have been obvious to the trial court and that affect the substantial rights" of the party.

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[1] The issues raised in this portion of the Brief directly correspond to the five (5) issues raised by Appellants at pp. 2-3 of their Brief. Issues pertaining to the Cross-Appeal are discussed in Section IX, infra.

Additionally, the appellant must be able to demonstrate a reasonable likelihood that absent the plain error, the outcome at trial "would have been more favorable." E.g., State v. Ellifritz, 835 P.2d 170, 174 (Utah App. 1992); State v. Morgan, 813 P.2d 1207, 1210-1211 (Utah App. 1991); State v. Eldredge, 773 P.2d 29, 35 (Utah), cert. denied, 493 U.S. 814 (1989); State v. Verde, 770 P.2d 116, 122 (Utah 1989).

APPELLANTS' ISSUE NO. 2 (Punitive Damages Amount)[2]:

a) Did the trial court err by not further remitting the punitive damages awarded against Appellants when the court considered each of the factors set out by this Court in Crookston?

b) Can the Court properly review the trial court's order remitting punitive damages when the Appellants failed to marshal the evidence supporting the award of punitive damages?

Standard of Review: The standard of review in considering a trial court's ruling with regard to a new trial motion challenging a verdict as excessive is whether there is a reasonable basis for the decision. E.g., Crookston v. Fire Ins. Exch., 817 P.2d 789, 805 (Utah 1991).

APPELLANTS' ISSUE NO. 3 (Punitive Damages Against University Properties):

a) Did the trail court properly uphold a jury verdict for punitive damages against both a Utah corporation in good standing and its majority (but not sole) shareholder for their separate conduct when there was no piercing of the corporate veil?

b) Did the trial court properly uphold a jury verdict for punitive damages against University Properties when the evidence established that Gilbert R. Turner in addition to Richard Knapp were acting as University Properties' agents and engaged in fraudulent conduct toward Diversified?

STANDARD OF REVIEW: This issue raises a question of law which is reviewed for correctness. E.g., Provo City v. Nielson Scott Co., 603 P.2d 803, 806 (Utah 1979).

APPELLANTS' ISSUE NO. 4 ("Admissibility of Evidence Issue"):

a) Did the trial court err in excluding evidence of a subsequent sale of the property by a third-

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[2] It should be noted that regardless of how the Court resolves the "Election of Remedies Issue" (Issue No. 1), the issues pertaining to punitive damages must still be resolved as the jury in this case expressly determined that Appellants' conduct gave rise to an award of punitive damages against all Appellants.

party four years after the fraud, and after Diversified had performed substantial work, improvement and management of the property?

b) Did the trial court err in excluding evidence of Appellant Knapp's settlement offer to repurchase the property for the price Diversified paid for the property after Diversified had acquired, managed and improved the property?:_

Standard of Review: The standard of appellate review for a trial court's evidentiary ruling is an abuse of discretion and the trial court's ruling is given deference in light of its advantageous position. E.g., Nay v. General Motors Corp., 850 P.2d 1260, 1262 (Utah 1993)("abuse of discretion and reverse only if the ruling is beyond the bounds of reasonability"); Heslop v. Bank of Utah, 839 P.2d 828, 838 (Utah 1992)("court's rulings regarding admissibility will not be overturned 'unless it clearly appears that the lower court was in error'").

APPELLANTS' ISSUE NO. 5 (Termination of Judgment Lien):

Did the trial court err in terminating Diversified's statutorily created judgment lien upon the filing of a supersedeas bond while expressly refusing to (and being unable to) grant Diversified a perfected lien in the deposited security as of the date of the original judgment?

STANDARD OF REVIEW: This issue raises a question of law which is reviewed for correctness. E.g., Provo City v. Nielson Scott Co., 603 P.2d 803, 806 (Utah 1979).

III. DETERMINATIVE CONSTITUTIONAL/STATUTORY PROVISIONS

There are no determinative constitutional or statutory provisions.

IV. STATEMENT OF THE CASE PERTAINING TO INITIAL APPEAL

1. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW PERTAINING TO INITIAL APPEAL

This an appeal from a Judgment entered by the Fourth District Court, Honorable James R. Taylor presiding, pursuant to a jury's verdict in favor of Appellee Diversified. Following the jury trial of this matter and pursuant to the jury's verdict, the trial court entered judgment in favor of Diversified and against the Appellants as follows[3]:

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[3] A true and correct copy of the Judgments are attached hereto as Addendum "A".

APPELLANT[4]	FRAUD DAMAGES	NEGLIGENCE DAMAGES	PUNITIVE DAMAGES
KNAPP	$71,336	$73,500	$1,750,000
UNIVERSITY	$71,336	-0-	$1,000,000
HAWS	$71,336	$52,500	$130,500

Following a Motion for New Trial, the trial court issued a very detailed Memorandum Decision [R2072-2091] whereby it conditionally granted the Motion for New Trial unless Diversified accepted a remittitur of the damages, which Diversified did.[5] The trial court then remitted the negligence damages from $210,000 to $65,000, and the punitive damages from $5,130,500 to $1,052,757, and entered a Judgment (modified)[6] in favor of Diversified as follows:

APPELLANT	FRAUD DAMAGES	NEGLIGENCE DAMAGES	PUNITIVE DAMAGES
KNAPP	$71,336	$22,750	$500,000
UNIVERSITY	$71,336	-0-	$214,000
HAWS	$71,336	$16,250	$130,500

[4] Judgment was also entered against Defendant Gilbert R. Turner for $71,336 on the fraud claim, $84,000 on the negligence claim, and $2,250,000 in punitive damages. The award against Mr. Turner was subsequent remitted by the trial court to $71,336, $26,000 and $208,257, respectively. Defendant Turner did not make any post-trial challenges nor has he filed an appeal so that portion of the Judgment is not at issue on the appeal or cross-appeal.

[5] Diversified has filed a Cross-Appeal challenging the trial court's authority to grant a new trial based solely on the ratio of the award of punitive damages to compensatory damages when there was no evidence that this properly instructed jury acted on improper passion or prejudice, and the trial court's remittitur of the negligence damages in this case. It should be noted that if the trial court had the authority to grant a new trial in this case, Diversified does not challenge the trial court's reasoned analysis in remitting the punitive damages award wherein the trial court considered all factors set forth in the prior cases addressing punitive damages awards.

[6] A copy of the Judgment (Modified) is attached to Brief of Appellants as Exhibit "A".

2. STATEMENT OF FACTS PERTAINING TO INITIAL APPEAL[7]

The Transaction Regarding The Building At Issue

In mid-April, 1992 Mr. Parish (who became a principal of Diversified) was approached by Turner, a real estate agent for Appellant Haws Companies and they discussed a building known as the Temple View Terrace Building ("Building") which was for sale by First Security Bank. [TT 49-50] Turner was interested in finding out how much money Parish could put into a transaction and Turner represented to Parish that the Building could be purchased in the $600,000 to $700,000 range. [TT 53] Parish indicated to Turner that he might need a partner for such a transaction and Turner said his friend, Appellant Knapp, might be willing to act as Parish's partner in the transaction. [Id.]

Shortly thereafter Parish met Knapp at the Building. During this meeting, Knapp indicated he was a law student, but did not disclose that he was a real estate agent. [TT 55] In fact, during Parish's conversation with Messrs. Turner and Knapp, Parish asked Knapp if he had a real estate license and Knapp lied to Parish and said he did not. [TT 56] Moreover, neither Knapp nor Turner told Parish they worked together for the same brokerage firm, the Haws Companies, [TT 56] nor did they ever disclose that there was a partnership between Knapp and Turner whereby they were splitting the profits from any sale of the Building. [T.,T. 58-59 & 328-329] It was decided that Parish would obtain someone else to act as a partner in the transaction.

Following this meeting, on May 6, 2000, University Properties, a corporation of which Knapp was the 90% shareholder, acting through Knapp, entered into a Real Estate Purchase Contract to purchase the Building from First Security Bank for $700,000. This contract was entered into because Knapp and Turner, who had previously done deals together, had decided that Knapp would tie-up the Building, and they would see if they could find a buyer and split any profits. [TT 303, 393-394, 397] The pair had no intention of buying the Building, they only wanted to insert themselves into the middle of the transaction, boost the purchase price for their client,

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[7] The evidence must be viewed in a light most favorable to the jury's verdict.

Diversified, and put that extra money in their pockets. To this end, Knapp had testified in his deposition which was read to the jury that he had no intention of actually purchasing the Building, but simply wanted to tie-up the Building for a little while to see if they could get Parish or another buyer to come forward. [TT 350, 393-394 & 397]

Under this contract, University Properties was required to pay First Security Bank $5,000 earnest money deposit. Turner attempted to get Parish to pay that money by indicating the Building would go to auction if that $5,000 was not paid, but Parish refused to pay the money without a contract. Turner then informed Parish that Knapp had put up the $5,000 and purchased an "option" to buy the Building (which was a lie as this was not an option). [TT 57-58] Parish indicated to Turner that Diversified was willing to pay Knapp $10,000 profit on his "option", so they would purchase the Building for the option price plus $15,000 ($10,000 profit plus reimburse the $5,000 already paid). Parish asked Turner what the option price was, and Turner proceeded to place a call to Knapp who was in Florida and Knapp informed Turner the option price was $770,000, some $70,000 higher than the actual purchase price.[8] [TT 62 & 166-167] Parish had expected the option price to be much lower but, upon inquiry, was told by Turner that another party had come in with an offer of $750,000, which was not true. [TT 71] Parish then asked why the option price was not $755,000 and Turner again lied to Parish indicating that First Security liked the other buyer more than Knapp so Knapp had to offer a substantially higher price. [TT 71] Based on these misrepresentations, Diversified agreed to purchase the Building from University

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[8] Appellants' factual statement incorrectly states that "No call was in fact made to Knapp since Knapp was in Florida and not available to Turner by telephone. See Exhibit "B" to Brief of Appellant at page 5. That assertion is wrong and one of the many instances in which the Appellants fail to marshal the evidence in favor of the jury's verdict. Knapp's trial testimony was that he did have at least one conversation with Turner while he was in Florida, that Knapp could not remember if Turner had his phone number in Florida, and he could not remember whether Turner called him or not. [TT 731-732] Obviously, based on the foregoing evidence the jury could conclude that the telephone conversation wherein Knapp told Turner to tell Diversified that the option was $770,000, as opposed to the actual purchase price of $700,000, took place.

Properties for $785,000 (the option price, plus the $5,000 already paid by Knapp, plus $10,000 profit). [TT 60-61 & Exhibit 13]. University Properties accepted this offer through Turner who, with Knapp's consent, signed the purchase contract [Ex. 13] on behalf of Knapp and University Properties. [733-734] Knapp didn't even see the purchase contract which Turner had signed until after the closing. [TT 734]

If he hadn't known before, Knapp clearly learned prior to the closing that Turner had lied to Diversified regarding the option price in an effort to induce purchase at an inflated price, [T..T. 348] but did nothing to correct Turner's lies because in Knapp's opinion "it just wasn't any of their business what [University Properties] paid for the property". [TT 316-317 & 737] In response to learning that Turner had lied to Diversified, Knapp told Turner that he had better hope they don't find out about it, but Knapp took no steps to right the wrong. [TT 316 & 348]

Knapp also orchestrated the two closings, which were occurring on the same day at the same title company, such that Diversified would not learn the actual purchase price of the Building from First Security from University Properties. Knapp scheduled two separate closings and instructed the title company not to let Diversified know what University Properties was paying for the Building as Knapp didn't feel it was any of their business. [T.T.365] Moreover, it was Diversified's money that was used by University Properties, Knapp and Turner to purchase the Building from First Security Bank – University Properties did not bring one dime to the table when it purchased the property and then "flipped" it back to Diversified at profit.[9] [TT 395] University Properties did realize a profit on the transaction which was split with Turner, and Knapp, Turner and The Haws Companies received a commission on University Properties' purchase of the

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[9] At the closing, Mr. Woolley, a principal of Diversified realized that he would not receive $50,000 of the purchase price in time and had arranged to borrow the money at 18% interest. Turner, however, informed Woolley that Knapp said he would loan it for 10% interest. [TT 73-74] As it turned out, however, the "10% interest" rate was not per annum, but simply a ten-percent charge (i.e., 120% per annum). Knapp testified that Turner "was absolutely infamous" for telling people only half of the story, [TT314] and that Turner "lied to [Knapp] all the time." [TT 314]

Building from First Security. [TT 320][10]

Haws Companies' Misconduct and Ratification of the Fraud

Prior to the closing on the transaction at issue, The Haws Companies knew that Knapp would often purchase properties and then quickly re-sell them, something known an "flipping". [TT 241] The Haws Companies knew that it was a distinct possibility in this case as they told Knapp that if he purchased and sold the Building then The Haws Companies would be entitled to a commission. [TT 237-238] Haws further testified that he was concerned that Knapp and Turner would not make full disclosures, [TT 241] and that there was more to this transaction than they were being told. [TT 248-249] Nonetheless, The Haws Companies did nothing prior to closing to ensure that its client, Diversified, was being properly represented by The Haws Companies agents, and that full disclosures were made.[11] In fact, The Haws Companies only "supervision" was to hold weekly meetings which Turner and Knapp rarely attended. [TT 220 & 334] Following the closing, Diversified began to unravel the truth with respect to what had happened. The principals of Diversified met with Mr. West, the principal broker for the Haws Companies, and complained about the way the transaction was handled, the lack of representation by Turner, and the failure to make necessary disclosures. [TT 85] The Haws Companies' response was concern that the deal had closed and Haws Company did not receive their commission. [Id.] The Haws Companies did nothing to assist Diversified in correcting the problems created by the Haws Company's agents,

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[10] Turner also received back the $5,000 "option price" which he had told Diversified was non-refundable. In addition, Turner received an illegal "kickback" from Diversified's lender for introducing them to each other. Upon learning of this illegal kickback Turner received, Knapp testified that he was furious, not that there was a kickback or Diversified had been wronged, but that he didn't receive a cut. [TT 324]

[11] Moreover, when The Haws Companies purportedly terminated Turner before the closing of Diversified's purchase of the Building (the change card was actually filed after the closing of this transaction), The Haws Companies failed to inquire of Turner what transaction were pending or take any action to see this transaction through. [TT 228-229] Instead, The Haws Companies merely indicated to Turner that it expected its commission on any pending transactions when they closed. [TT 228-229, 467, 469 & Ex. 20]

Messrs. Knapp and Turner. [TT 85-86] In fact, the Haws Companies continued to ratify the improper transaction by repeatedly requesting their commission for the sale to Diversified for years after the transaction closed, even after they had dismissed both Knapp and Turner because of problems associated with this and other transactions they had performed while with the Haws Companies. [TT 250-251 & Exs. 43 & 51]]

Turner, Knapp and The Haws Companies' Affiliation

Turner became affiliated with The Haws Companies in December, 1991. Mr. Haws further testified that prior to Turner's affiliation with The Haws Companies, Mr. Haws did not know who acted as Turner's principal broker.[12] The evidence showed, however, that Haws was Turner's principal broker (at an agency called Pacific Western Co.) prior to that time and that Haws never told the principal broker of The Haws Companies, Mr. Robert J. West, Jr., that Haws had served as Turner's principal broker. [Ex. 82] During this time that Haws was Turner's principal broker, there was a Petition filed against Turner by the Utah Division of Real Estate for the misappropriation of earnest money deposits which led to the revocation of Turner's broker license (but not his agent license). [TT 306] Mr. Haws was sent a notice of the Petition against Mr. Turner and Haws also received a letter wherein Turner admitted to facts in the Petition. [421-423 & Exs. 1 & 2] Mr. Haws did not tell West about this Petition at the time West substituted as Haws for Turner's principal broker. [TT 446] At the time Turner became affiliated with The Haws Companies, they did not make any inquiry to determine whether Turner had complaints against him with the Utah Division of Real Estate. [TT 210-211, 446] In fact, Haws Companies did nothing more than interview Turner at the time he became associated with them. [TT 444]

Knapp was introduced to The Haws Companies by Turner with whom Knapp had done other deals with Turner acting as Knapp's agent. [TT 303] The Haws Companies gave Knapp a

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[12] Under Utah law, each real estate agent must associate with a principal broker at all times they are conducting business as a real estate agent. The principal broker must file a card with the Utah Division of Real Estate indicating they are acting as the agent's principal broker. Also, there is a change card filed when an agent's principal broker is changed.

very attractive commission split because Knapp was going to maintain a Provo office for The Haws Companies. [TT 292] Although Appellants' "facts" claim that there never was a Provo office established, there was substantial testimony to the contrary. For instance, the attractive commission split was conditioned on Knapp maintaining the Provo office, but that split was never reduced; therefore, it could be concluded that Knapp was in fact maintaining a Provo office. [TT 292,454-456, 497-498] Moreover, Mr. Jon Brown, an investigator for the Utah Division of Real Estate, testified that Knapp was improperly operating a branch office in Provo and that The Haws Companies was required to have a branch broker located in Provo to supervise those activities. [TT 416]

Prior to Knapp becoming affiliated with The Haws Companies, Knapp told Haws and West that he and his company University Properties did a lot of buying and selling on their own accounts, and that made Knapp attractive to The Haws Companies as they envision obtaining a commission on these transactions. [TT 702]

At the time he joined The Haws Companies, Knapp was a relatively new agent, but the Haws Companies provided no training, written materials, policy manuals or the like. [226] As Knapp explained it, The Haws Companies provided to Knapp "Zero. No training. No discussion about training. No manuals, no support, no nothing." [TT 753 see also] In spite of the fact that Haws testified that a broker has a duty to actively supervise its agents, [TT 177] The Haws Companies provided no supervision to Turner and Knapp who were improperly operating a branch office in Provo and who The Haws Companies recognized were a potential liability. [TT 241, 464]

Prior to the transaction at issue, Knapp and Turner had been involved in other deals wherein they split the profits. [TT 303] Also prior to this transaction, Knapp had loaned Turner money to assist Turner in settling the Petition with Division of Real Estate regarding misappropriation of trust funds. [TT 325-326] Knapp also testified that he knew prior to the transaction that Turner was a liar and a thief, [TT 325] and that "Turner lied to [him] all the time." [TT 314] Nonetheless, Knapp entered into a partnership with Turner and relied on Turner to make

the necessary disclosures. [TT 739-740]

Expert Witnesses' Undisputed Testimony Of Misconduct By Appellants

At the trial of this matter, two individuals testified as expert witness: Jon Brown, Chief Investigator of the Utah Division of Real Estate, and Mr. Richard Grow, a professional in the industry. Their undisputed testimony was that Appellants acted improperly in the following ways:

a) The Haws Companies failed to have a branch broker in the Provo office as required by Utah law; [TT 416]

b) Failed to properly supervise Knapp who was young, inexperienced agent; [TT 416]

c) Turner and Knapp violated standards in the industry by misrepresenting the amount of profit being made by the principal as $10,000 when it was in fact $85,000; [TT 430]

d) Knapp had duty to disclose the truth when he discovered another agent made misrepresentation to Diversified; [TT 430]

e) Violated standards by not disclosing the partnership between Turner and Knapp and splitting of profits; [TT 431]

f) The Haws Companies acted improperly in hiring Turner; [TT 634]

g) The Haws Companies acted improperly in training and supervising Turner and Knapp; [644]

h) The Haws Companies failed to have a proper exit interview to discovery pending transactions and to follow them through to completion; [TT 649]

i) The Haws Companies failed to take action to mitigate Diversified's damages and ratified the fraud; [TT 650].

Knapp's Lack Of Veracity

Knapp's testimony at trial was frequently untruthful or, at the very least, not forthcoming. For instance, Knapp testified that he did not know that Turner had told Diversified that he was only to make $10,000 on the transaction, which was directly contrary to the Answer he had filed in the case and prior deposition testimony. [TT 312-316] Also, Knapp testified that he would not accept less than $785,000 for the Building, when in his deposition he had testified that "if [they] made 10,000 that would have been okay". [TT 748-749] Knapp also lied when he testified that he was intending to actually purchase the Building when his own testimony indicated he was not going to

come up with the $70,000 necessary under the contract. [TT 350, 393-394 & 397] Finally, following the trial court's refusal to admit a taped transcript of a conversation Knapp had with Mr. Jon Brown, Investigator for the Division of Real Estate, Knapp denied having made certain statements even though those statements were recorded. Knapp's lack of veracity to the jury and the trial court is simply a continuation of Knapp's misconduct and attempt to defraud Diversified.

V. SUMMARY OF ARGUMENTS PERTAINING TO INITIAL APPEAL

POINT 1: An Integration Clause In A Contract Does Not Bar Recovery For Fraud Or Negligent Misrepresentation: Appellants have failed to preserve and expressly waived this issue by consenting to the jury being instructed that an integration clause does not bar recovery for fraud. Moreover, Appellants' counsel expressly indicated to the trial court that this very argument would not be made. Thus, this issue has been waived by Appellants. Finally, Diversified, as the defrauded party, had the legal right to affirm the contract and sue for damages. Appellants' position is not only contrary to this Court's prior decisions and the vast majority of cases from other jurisdictions, but it would eliminate all risk to a defrauding party who inserts an integration clause in the contract because the defrauded party would have to either operate under the fraudulently induced contract, or would have to rescind the contract. Either way, the defrauding party would not have to pay damages to the defrauded party.

POINT 2: The Trial Court Did Not Err In Failure To Further Remit The Punitive Damages Award: In remitting the punitive damages award, the trial court issued a 27-page Memorandum Decision wherein it expressly considered in detail the trial evidence consistent with this Court's direction in Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991)("Crookston I"). That Memorandum Decision more than adequately "explain[s] why the award is not excessive despite the fact that [the award as to some Appellants] exceeds the general pattern of awards upheld in our prior cases." Id. at 811-812. In contract, Appellants failed to marshal the evidence and demonstrate why the remitted punitive damages award is improper. Moreover, the Appellants' Constitutional challenge must fail as the procedural safeguards more than satisfy any due process

concerns, particularly when the award is compared to those struck down as unconstitutional. Finally, when considering the ratio of punitive to actual damages, all damages caused by the misconduct should be considered and such analysis should be done with respect to each individual. There is no authority for Appellants' argument that all defendants should be lumped together and, more importantly, to do so would preclude a court from applying the factors set forth in Crookston.

POINT 3: Punitive Damages Were Properly Assessed Against University Properties: University Properties, a Utah corporation, was assessed punitive damages in this case separate and apart from Mr. Knapp, its primary (but not sole shareholder). Such an award was proper where the evidence established that University Properties acted independently of Mr. Knapp (according to Knapp's own testimony) and actively participated in the fraud. University Properties' conduct warranted punitive damages. Moreover, Turner affirmatively acted as University Properties' agent and, therefore, Turner's misconduct is clearly attributable to University Properties.

POINT 4: The Trial Court Properly Precluded Evidence Of : (1) A Sale Of The Building Four-Years After This Transaction; and (2) An Offer Of Compromise: The evidence of the sale of the Building four-years after this transaction was proper under the Utah Rules of Evidence as it would was not relevant, would require a vast amount of evidence pertaining to other matters such as the real estate trends, improvements/investments to the property, etc. Likewise, the evidence of Knapp's settlement offer to repurchase the Building for the price paid by Diversified after Diversified had improved the property and incurred substantial costs in connection with transaction was properly excluded. Settlement offers are properly precluded under the Utah Rules of Evidence and Diversified certainly has the option of refusing to rescind the transaction and recover its damages. Finally, even if the evidence should have been admitted, Appellants have wholly failed to establish that it was "harmful error" such that the error affected the outcome of the proceedings.

POINT 5: The Trial Court Erred In Terminating The Judgment Lien: The posting of a supersedeas bond is not sufficient for the removal of a judgment lien. The Utah statute requires a deposit of "cash or other security" and that the court grant the judgment creditor a perfected lien in

the deposited security. Clearly, a trial court cannot grant a perfected lien in a supersedeas bond and, as such, it is not sufficient "cash or other security" for the release of a judgment lien.

VI. ARGUMENTS REGARDING ISSUES PERTAINING TO INITIAL APPEAL

1. APPELLANTS' FAILED TO PRESERVE AND WAIVED THE "ELECTION OF REMEDIES" ISSUE WHEN THEY: (A) FAILED TO OBJECT AND EXPRESSLY CONSENTED TO THE TRIAL COURT INSTRUCTING THE JURY THAT "AN INTEGRATION CLAUSE IN A CONTRACT BETWEEN THE PARTIES DOES NOT BAR RECOVERY FOR FRAUD OR NEGLIGENT MISREPRESENTATION"; AND (B) THEIR COUNSEL AFFIRMATIVELY REPRESENTED TO THE TRIAL COURT THAT THEY WOULD NOT MAKE THE ARGUMENT THAT AN INTEGRATION CLAUSE BARS RECOVERY FOR FRAUD.

The issue now raised by Appellants that the integration clause in the contract bars Diversified's action for fraud was not preserved and was waived by Appellants. Jury instruction number 41 provided as follows: "An integration clause in a contract between the parties does not bar recovery for fraud or negligent misrepresentation." At the time this instruction was discussed, Appellants' counsel not only did not object to it, but expressly agreed to it and represented to the trial court that this very argument would not be made:

[Diversified's counsel]: The proof is in, your Honor, but I wouldn't want to hear in closing argument that because there was this integration clause my clients are precluded from being able to prove fraud.

[Appellants' counsel]: I won't make the argument.

See Partial Transcript of February 25, 2000 proceedings, at 46-48, attached hereto as Addendum "B".[13] Thus, Appellants have failed to preserve this issue and their appeal must be dismissed.

Despite the foregoing clear failure to preserve the issue and the express waiver of the issue, Appellants claim that they preserved the issue on the first day of trial at pages 11 and 12 of the trial transcript. That simply is not the case. That citation refers to a discussion which was being held in connection with Diversified's motion in limine to exclude evidence of Appellant Knapp's settlement offer to repurchase the property for the price Diversified paid for the property after Diversified had acquired, managed and improved the property. The only argument Appellants' counsel made at pages 11 and 12 of the trial transcript was that this offer of compromise should be allowed to show the mitigation of Diversified's damages. Clearly this is not sufficient to preserve

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[13] This portion of the transcript was not transcribed and indexed by the trial court's clerk, but will be supplemented into the record.

the much different issue that Appellants now raise, namely that integration clause in the fraudulently induced contract bars the claim for fraud. Thus, this issue should not be considered on appeal.

2. ASSUMING THE ISSUE WAS PRESERVED AND NOT WAIVED, THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THAT DIVERSIFIED COULD AFFIRM THE FRAUDULENTLY INDUCED CONTRACT AND RECOVER DAMAGES RESULTING FROM APPELLANTS' FRAUD AND NEGLIGENCE.

The victim of fraud in Utah has the right to affirm the contract, receive and enjoy the benefit of the contract and sue for the damage caused by the fraud. E.g., Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980). He is not relegated to contract damages as Appellants suggest. As a matter of public policy, Appellants' argument must fail as the law does not allow a party to fraudulently induce a party to enter into a contract and then elude liability because the defrauded party chooses to affirm the contract. Otherwise, a party who commits fraud could commit fraud with impunity by simply inserting an integration clause into the fraudulently induced contract and they would never be held accountable for the fraud as the defrauded party would have to either affirm the contract (and not be able to sue for damages) or rescind the contract and simply be placed back in the same position they were before the contract. There would be no disincentive to a party committing fraud because they would have nothing to lose – they would either operate under the fraudulently induced agreement or they would return to the status quo which existed prior to the contract. Thus, if Appellants' position were adopted, there would be no possibility of damages ever being incurred as a result of fraudulent conduct provided the defrauding party inserted an integration clause into a contract.

This result argued by Appellants is further undesirable given that the decision to affirm a contract occurs particularly often in cases where the fraud was not discovered for some time and the defrauded party had acted under the contract such that recission would be very difficult. A victim of fraud often has, as in this case, made a substantial commitment of money, time and effort to a project by the time he learns of the fraud. For that and other reasons he may be reluctant to

undo the deal since return of the consideration may not adequately take into account all his losses. Therefore, the law allows him to affirm the contract and sue for damages.

In Dugan, the trial court ruled that by entering into possession, remaining in possession until the time of trial, and otherwise accepting the benefits of the purchase, the defrauded party was precluded from recovering damages for fraudulent misrepresentation. This Court reversed, holding that in a fraud action the defrauded party is entitled to affirm the contract, proceed with performance, "and recover damages for misrepresentations." Dugan, 615 P.2d at 1247; see also Pace v. Parish, 247 P.2d 273 (Utah 1952)(same). Here the contract was fully performed at the time Diversified discovered the fraud. The money had been paid and Diversified had begun substantial improvements on the property. Diversified was clearly within its rights to affirm the contract and did not waive the right to claim damages.

Appellants, relying on a couple of cases from Georgia and no Utah cases, argue that the purported merger or integration clause precludes any recovery by Diversified on its fraud claim. This argument, however, is contrary to Utah law. E.g., Ong Int'l. (U.S.A.) Inc. v. 11th Ave. Corp., 850 P.2d 447, 451-453 (Utah 1993)(release set forth in fraudulent induced agreement does not bar subsequent tort claims)(Lamb v. Bangert, 525 P.2d 602, 604 (Utah 1974)(contract clause purporting to limit recovery did not apply in fraud action); see also Conder v. A.L. Williams & Assocs., Inc., 739 P.2d 634, 638-639 (Utah App. 1987)(summary judgment reversed where party indicated relying on oral assertions contrary to writing); Berkely Bank for Coops. v. Meibos, 607 P.2d 798 (Utah 1980)(reliance reasonable even where a plaintiff executes a written agreement in reliance upon verbal promises that the contrary written provision is not operative)(cited with approval in Conder). As this Court stated in Pearce v. Shurtz, 270 P.2d 442, 446 (Utah 1954), "a statement in the contract that fraud did not exist in its formation could not make that so". If such a direct statement could not relieve a defendant of his fraud, certainly the strained reading of the integration clause argued by Appellants is not Utah law.

Moreover, the vast majority of courts which have addressed the issue (with the exception of

Georgia) find that an integration or merger clause does not foreclose a claim for fraudulent representations that induced the contract. E.g., Sperau v. Ford Motor Co., 674 So.2d 24, 42 (Ala. 1995)(integration clause does not bar fraud claim); Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp., 38 Cal. Rptr.2d 783, 784 (Ct. App. 1995)("The provision in the [Agreement] stating that no representations were made by the parties except as set forth in the agreement does not preclude appellants from proving fraud" and recognizing "a line of California authority holding that a contract provision stating that all representations are contained therein does not bar an action for fraud."); Keller v. A.O. Smith Harvestore Prods., Inc., 819 P.2d 69, 73 (Colo. 1991)(general integration clause does not effect a waiver of a claim of negligent misrepresentation); Agristor Leasing v. Saylor, 803 F.2d 1401 (6th Cir. 1986)(same); Moffan Enters., Inc. v. Borden, Inc., 807 F.2d 1169 (3d. Cir. 1986)(same applying Pennsylvania law); Salkeld v. Business Brokers, 548 N.E.2d 1151, 1157-1158 (Ill. App. 1989)(ends of justice not served by allowing merger clause to mask allegation of fraudulent misrepresentation); Ferrell v. Cox, 617 A.2d 1003, 1006 (Maine 1992)("Maine precedent is clear. A signed agreement that contradicts prior oral statements does not bar an action for fraud as a matter of law."); VMark Software, Inc. v. EMC Corp., 642 N.E.2d 587, 596 (Mass. App. 1994)(party may not escape liability for misrepresentation by resorting to integration clause); Hanks v. Hubbard Broadcasting, Inc., 493 N.W.2d 302 (Minn. App. 1992)("a full integration clause does not prevent proof of fraudulent representations by a party to a contract"); Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd., 820 P.2d 1323, 325-1326 (N.M. 1991)(integration clause does not bar fraud claim "whether the action be for recission of the contract or for damages for deceit"); Chase v. Columbia Nat'l Corp., 823 F.Supp. 654, (S.D.N.Y. 1993)(merger clause does not bar claim for fraud); Lee v. Goldstrom, 522 N.Y.S.2d 917, 917 (1987)("merger clause in the contract does not preclude an action to recover damages for fraud in the inducement nor does it bar parol evidence concerning the alleged fraudulent representations set forth in the complaint); Lance v. Bowe, 648 N.E.2d 60, 63-64 (Ohio App. 1994)(integration clause does not bar fraud claim); Gilliland v. Elmwood

Properties, 391 S.E.2d 577, 580-581 (S.C. 1990)("a seller should not be allowed to hide behind an integration clause to avoid the consequences of a misrepresentation whether fraudulent or negligent"); Silva v. Stevens, 589 A.2d 852 (Vermont 1991)(jnov improper despite "as is" language in contract as jury could find such language irrelevant to question of reliance); Stemple v. Dobson, 400 S.E.2d 561, 566-567 (W.Va. App. 1990)("as is" clause does not bar fraud claim); Richey v. Patrick, 904 P.2d 798, 804 (Wyo. 1995)(same); Grube v. Daun, 496 N.W.2d 106, 117-118 (Wisc. App. 1992)(integration clause may not be used to escape liability for misrepresentations).

Based on the foregoing, the purported merger clause does not bar Diversified's fraud claim and the Judgment should be affirmed.

3. THE TRIAL COURT WAS CORRECT IN NOT FURTHER REMITTING THE PUNITIVE DAMAGES AWARD.

A) The Trial Court's Detailed Memorandum Decision Adequately Supports The Punitive Damages Award Which Should Be Upheld.

In ruling on the motion for new trial or, in the alternative, a remittitur of damages, the trial court issued a twenty-six page Memorandum Decision. [R2072-2097] A true and correct copy is attached hereto as Addendum "C". Beginning on page 7 of that Memorandum Decision [R2091] the trial court analyzes in detail the award of punitive damages against each Appellant under the seven (7) factors set forth by this Court in Crookston. The reasoned analysis set forth by the trial court led to a reduction in the punitive damages awarded against Appellant Knapp (from $1,750,000 to $500,000), and University Properties (from $1,000,000 to $214,000).[14]

Appellants concede on page 35 of their Brief that Crookston I recognizes that a trial court can justify an award of punitive damages which exceeds the generally upheld ratios:

The judge's articulation should generally be couched in terms of one or more of the seven

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[14] The punitive damages award of $130,500 against the Haws Companies was found by the trial court to be a ratio of punitive to actual damages of 1.5 to 1, so that amount was not remitted. Punitive damages against Defendant Turner, who has not appealed the Judgment, were remitted from $2,250,000 to $208,257.

> factors we earlier listed as proper considerations in determining the amount of punitive damages, unless some other factor seems compelling to the trial court.
>
> . . .
>
> In sum, the trial court's articulation should explain why the award is not excessive despite the fact that it exceeds the general pattern of awards upheld in our prior cases.
>
> Id. at 811-812.

That is precisely what the trial judge did in this case. In his twenty-six page Memorandum Decision, Judge Taylor painstakingly analyzes each factor set out by this Court with respect to each Appellant and determines the appropriate amount of punitive damages. For instance, with respect to Appellant Knapp the trial court spend seven (7) pages in determining that the appropriate of punitive damages was $500,000, a remittitur of $1,250,000. A simple reading of the Judge's Memorandum Decision demonstrates conclusively that the trial court complied with this Court's directive in Crookston I. Moreover, the Judge's decision complies with the requirements set forth in the subsequent Crookston case, 860 P.2d 937 (Utah 1993) wherein this Court affirmed a trial court which issued "a very detailed 23-page memorandum" wherein it justified awarding a punitive damages award which was without precedent in Utah. Thus, the trial court's reasoned, detailed analysis of each of the punitive damages awards should be upheld. In fact, as discussed below in connection with the Cross-appeal, the evidence adduced at trial more than adequately supports the jury's punitive damages award; therefore, the remitted punitive damages award is clearly proper under Utah law.

B) Appellants' Constitutional Challenge Against The Award Of Punitive Damages Must Fail.

Appellants also argue that the punitive damages award in this case violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This case, and the various punitive damage awards granted by this jury in this case, are a far cry from the $2,000,000 punitive damages award that was 500 times the actual damages of $4,000 the United States Supreme Court reviewed in BMW v. Gore, 517 U.S. 559 (1996).[15] Likewise, the other cases cited by Appellants

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[15] The BMW case, with its 500 to 1 ratio, was the first time the United States Supreme Court upheld a due process challenge against punitive damages.

do not support their claim of a due process violation as none upheld a due process challenge to punitive damages. E.g., Owens-Corning Fiberglass Corp. v. Wasiak, 927 S.W.2d 35 (Tex. 1998)(punitive damage award of $5.2 million upheld against due process challenge); Transportation Ins. Co. v. Moriel, 879 S.W.2d 10 (Tex. 1994)(did not address constitutional challenge to punitive damages award).

Moreover, the due process challenge must fail as the State of Utah has provided substantial substantive and procedural safeguards to minimize the risk of unjust punishment. Those substantive and procedural safeguards, which substantially encompass the three "guideposts" identified in BMW, show that the punitive damage awards which, while high, are justified by the facts of this case.

C) The Crookston 3 To 1 Formula Is Not To Be Applied Mechanically.

While this Court in Crookston I discussed a 3 to 1 ratio, the Court was careful to make it clear it was not setting a ceiling:

> . . .[T]he absolute ceiling approach is too mechanical and could potentially defeat the very purpose of punitive damages. [citations omitted]. For example, strict dollar amount, percentage of the defendant's wealth, and ratio ceilings all would allow potential defendants to calculate their exposure to liability in advance, thus diminishing the deterrent effect of punitive damages. In addition, such absolute ceilings do not provide the flexibility needed to deal adequately with the type of case that involves only minimal actual damages, but where the conduct of the defendant is so flagrant as to justify a large punitive award. Crookston I, 817 P.2d at p. 809.

Indeed, in Crookston II, the Utah Supreme Court accepted the trial court's analysis and upheld a punitive damage award of $4 million where the ratio exceeded 10 to 1. Thus, the 3 to 1 ratio is a soft ceiling indeed, and now given Crookston II and the experience it gives the Court, the ratio itself may be changing. See Crookston II, 860 P.2d at 941-942. Moreover, the trial court's detailed Memorandum Decision adequately supports an the punitive damages award in this case.

D) The Damage Done To Diversified by Appellants' Combined Tortious Conduct Juxtaposed Against The Individual Appellants' Punitive Damages Assessment Yields The Proper Ratio.

If the punitive damages award is viewed carefully and analytically, it is clear that it is the result of careful jury analysis. Appellants should give the jury the same respect and dignity as the

jury gave to its deliberations. When that is done the verdict is very sensible and appropriate.

The punitive damages assessed against the Appellants were as follows:

Appellant	Amount	Ratio to Actual Damages
Richard M. Knapp	$1,750,000	5.2 to 1
University Prop.	$1,000,000	Less than 3 to 1
The Haws Companies	$ 130,500	Less than ½ to 1

The foregoing assessments of punitive damages are each appropriate as the negligent and fraudulent conduct of each Appellant significantly contributed to Diversified's loss. But for Knapp's and Turner's lies and neglect of duties to disclose, the fraud would not have occurred. Likewise, had The Haws Companies not neglected proper supervision, and when presented with this deal that caused Haws to worry that Knapp would "flip" the property without making proper disclosures taken steps to see the disclosures were made, the injury would not have occurred.

Appellants' argument that the Court should not consider all elements of damage in determining the ratio are without merit. This Court ruled in Ong Int'l (USA) Inc., v. 11th Ave. Corp., 850 P.2d 447, 458-459 (Utah 1993) that the trial court should compare all compensatory damages, not just the damages individually assessed, in making the ratio analysis. While the Court in Ong did not explain its ruling, the purpose of the ratio analysis is not to fix the amount of punitive damages, but to provide a gauge to determine from the jury's view the seriousness of the transgression and whether that seriousness guided the jury's deliberations as opposed to other influences we call "passion and prejudice." It is appropriate in that light to view all the compensatory damages in order to understand the gravity of the offense from the jury's perspective.

On the other hand, it would be unfair to the jury to judge their award of punitive damages in the aggregate, as if they had not used discernment in affixing an appropriate award against each Defendant based on his share of responsibility for the serious injury sustained by Diversified. As the trial court pointed out in its jury instructions, punitive damages are meant to be tailored to each defendant. What might be a proper award against one defendant because of his wealth, the extent of his culpability, and the other factors, may be totally inappropriate when applied to another

defendant.

This jury, under proper instruction from the trial court, performed its job admirably. Had the jury simply been carried away by passion and prejudice, one would have expected multi million dollar awards against each Appellant. Instead, the punitive damage awards ranged from $130,500 against The Haws Companies to $1,750,000 against Knapp. That range in awards demonstrated a discernment by the jury which should not be ignored by a mindless grouping of the punitive damages the jury grappled with to individually decide.

E) The Jury's Negligence Award Is Not "Soft" Damages And Is The Type Of Injury For Which Punitive Damages Are Appropriate.

Appellants' argument that the punitive damages are excessive is based on the improper failure to consider any damages except the $71,336 in fraud damages.[16] Appellants' failure to include the $210,000 in negligence damages, or the remitted negligence damage amount of $65,000, in its ratio determination is based on the assertion that punitive damages cannot be awarded for negligence. While it is true that ordinary negligence does not support a punitive damage award, as the trial court found the Appellants' conduct in this case went beyond "ordinary negligence." Rather, Appellants intentionally, or at least knowing and recklessly, neglected the standards of conduct that would have prevented this loss. Appellants neglected their duty to represent Diversified's interest in getting the lowest possible price from First Security Bank. Appellants neglected their duty to disclose the relationship of Knapp and Turner as partners in this scheme to defraud Diversified and Appellants neglected their duty to disclose Turner's position as a principal in the transaction. Appellants also neglected to disclose the fraudulent conduct of Turner.

Appellants knowingly neglected these duties because their defrauding of Diversified could

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[16] Appellants also fail to include the prejudgment interest awarded on the fraud claim in determining the ratios. This Court, however, has specifically included a return on investment award (which is essentially what prejudgment interest represents) as an element of damages to be considered in evaluating the ratio of punitive to compensatory damages. Ong, 850 P.2d at 457-459, Moreover, the Ong court expressly recognized that prejudgment interest is a consequential damage. Id. at n. 44.

not succeed had they acted in compliance with these standards. This is exactly the conduct our legislature appropriately condemned as worthy of punitive damages. See Utah Code Annotated § 78-18-1; Behrens v. Raleigh Hills Hosp., Inc., 675 P.2d 1179, 1186-1187 (Utah 1983); Miskin v. Carter, 761 P.2d 1378, 1379-1380 (Utah 1988). Thus, these damages which resulted from Appellants' misconduct should all be considered in evaluating the propriety of the punitive damages assessed by the jury.

F) Appellants Fail To Marshall Evidence Supporting Punitive Damages Award.

While Appellants argue that the remitted amount of punitive damages awarded by the trail court is not appropriate under the Crookston factors, they completely fail to address the facts raised by the trial court in its 27-page Memorandum Decision wherein it sets forth in detail the evidence and legal analysis support its conclusion that its remitted award of punitive damages are proper. Instead, Appellants argue at pages 41 through 45 of their Brief that the selected facts they choose to cite do not support the punitive damages award. They simply fail to demonstrate why the trial court's reasoned, 27-page Memorandum Decision should not be upheld. Moreover, they simply argue selected "facts" by which they attempt to make their actions look harmless and fail to mention critical evidence which the trial court relied upon and which support a very significant award of punitive damages. For instance, they argue that Appellant Knapp "cannot be in a position to perpetrate the same conduct in the future." That simply is not true. As the evidence at trial and as set forth in the trail court's Memorandum Decision and the foregoing Statement of Facts establishes, throughout trial Appellant Knapp claimed that he was not acting as a real estate agent in this transaction and, therefore, he (and University Properties which is still operating) clearly is in a position to perpetrate this conduct as he regularly buys and sells real estate. [TT 700, R 2078, 2082-2083] Moreover, at the time of trial Appellant Knapp was eligible for reinstatement of his real estate license. Thus, contrary to Appellants' selected "facts", Appellant Knapp clearly is in a position to perpetrate the same conduct in the future and for this reason, as well as the other factors

set forth in Crookston I, a substantial punitive damages award is proper.[17] Appellants cannot simply pick and choose the facts which are least egregious when they are attacking the trail court's detailed analysis which expressly sets forth the evidence supporting the remitted punitive damages award.

4. THE TRIAL COURT DID NOT ERR IN ALLOWING AN AWARD OF PUNITIVE DAMAGES AGAINST BOTH APPELLANT KNAPP FOR HIS MISCONDUCT AND A SEPARATE UTAH CORPORATION, UNIVERSITY PROPERTIES, THE SELLER OF THE PROPERTY.

A) Punitive Damages Against University Properties Were Appropriate Based On The Conduct Of Its Agent, Appellant Knapp.

Appellants' contention that the award of punitive damages against Appellant Knapp and against Appellant University Properties, a Utah corporation, constitutes an impermissible double recovery is contrary to the facts and the law. Ironically, Appellants are now asking this Court to do something that they adamantly opposed during trial, namely to completely disregard that University Properties is a separate entity[18]. Now that it appears expedient to Appellants they ask that the corporate identity of University Properties be ignored. That simply is not proper.

With respect to Appellants' legal argument that punitive damages against University Properties are improper as a matter of law, Appellants completely omit pertinent Utah law which refutes their argument.[19] As this Court explained in Johnson v. Rogers, 763 P.2d 771, 779 (Utah

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[17] A very detailed analysis of the evidence supporting each of the Crookston I factors is set forth, infra, at Section IX, 2.

[18] For instance, Appellant Knapp testified that University Properties, not Knapp, was the principal in the transaction at issue [TT 303], and that it was University Properties, not Knapp, who was doing the deal. [TT 329] Again, when asked whether Knapp personally made an offer to purchase the property at issue, he answered, "No. University Properties made an offer to buy the building" [TT 718], and Knapp accepted the counteroffer "on behalf of University Properties". [TT722] Moreover, when Knapp was asked whether he received the profit on the sale of the property to Diversified, Knapp corrected counsel and said that "University Properties was paid that money". [TT318]

[19] Appellants primarily rely upon a North Carolina case, Watson v. Dixon, 511 S.E.2d 37, 41 (N.C. App. 1999). In that case, however, the court upheld a punitive damages award of $5,000 against the employee and $500,000 against the employer even though the jury

1988), and Hodges v. Gibson Prods. Co., 811 P.2d 151, 163 (Utah 1991), the Restatement (Second) of Torts § 909, followed in those cases, sustains the availability of punitive damages against an employer on the basis of vicarious liability. That section provides in pertinent part:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
>
> (a) the principal or manager agent authorized the doing and manner of the act; or
> . . .
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
> (d) the principal or a managerial agent of the principal ratified or approved the act.

Under the foregoing standard, the mere fact that a managerial agent (i.e., Knapp) or a corporation (i.e., University Properties) engaged in conduct warranting punitive damages is sufficient in and of itself to subject the principal to liability for punitive damages. In Hodges, this Court affirmed a punitive damages award of $1,000 against the employee and $7,000 against the employer based solely on the employee's misconduct. Hodges, 811 P.2d at 163 ("Because [agent] was a manager and acted in his managerial capacity, [principal] is also liable, through [agent], for punitive damages."); see also Albuquerque Concrete Coring Co. v. Pan Am Worlds Servs., Inc., 879 P.2d 772, 778 (N.M. 1994)("We do not, however, change the requirements that to incur punitive damages, a corporation must itself be culpable. When a corporate agent with managerial capacity acts on behalf of a corporation, pursuant to the theoretical underpinnings of the Restatement rule of managerial capacity, his acts are the acts of the corporation; the corporation has participated."). Thus, the award of punitive damages against the two separate Appellants, Knapp and University

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exonerated the employer for alleged negligent retention. This holding supports the award against University Properties. The only Utah authority cited by Appellants is Nelson v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints, 935 P.2d 512 (Utah 1997), does not even involve punitive damages. Instead, it holds that an injured party may recover against an employer based on the conduct of a negligent employee, but an employer is not responsible for negligence damages if employee has fully paid all damages. Clearly that case is inapposite. Additionally, Appellants improperly cite two (2) unreported cases, one (CP & B from Alabama) for the proposition that punitive damages are not recoverable against an employer based simply on negligent hiring or supervision, and the other (McLain from North Carolina) for the proposition that a plaintiff cannot recover more than once. Those cases are clearly inapposite.

Properties, is proper as a matter of law and should be affirmed.

B) Punitive Damages Against University Properties Were Appropriate Based On The Conduct Of Its Agent, Defendant Turner.

Another basis for affirming the award of punitive damages against both Knapp and University Properties is that, contrary to Appellants' argument, Knapp was not the only person to act on behalf of University Properties in connection with this transaction. At trial Knapp testified that Defendant Turner was authorized to act on behalf of University Properties. Appellant Knapp's trial testimony was that while Knapp was in Florida prior to the agreement between University Properties and Diversified being struck, Knapp told Turner that he wanted Turner to "make it happen" and "to take care of it for [him] while [he] was gone." [TT 733] Knapp even expressly authorized Defendant Turner to sign the fraudulently induced sales agreement with Diversified on behalf of Knapp "as president of University Properties". [Id.] And, in fact, Turner signed the sales contract with Diversified on behalf of University Properties while Knapp was in Florida [Id. and Trial Exhibit 13] and Knapp did not even see this agreement until after the closing. [TT 734] Knapp testified Turner's critical involvement in completing this transaction for University Properties as follows:

> Q. When you returned from Florida what further steps, if any, did you make [sic] relating to the transactions of the Temple View Terrace Building?
>
> A. Again, this was Gil [Turner's] transaction. I didn't have a very big part if any role at all in that.
>
> Q. Do you recall any specific steps that you took after you returned from Florida?
>
> A. I spoke with Gil [Turner] about it to get the update on the transaction, but that's all I can remember.
>
> [TT 733-734]

As this evidence shows, Turner also was acting on behalf of University Properties in connection with this transaction and his fraudulent conduct was on behalf of University Properties, with whom Turner was sharing the profit. Turner's conduct which is clearly attributable to University Properties is another basis upon which the punitive damages award against University Properties

should be affirmed.

5. THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE OF THE SUBSEQUENT RESALE OF THE PROPERTY BY ANOTHER ENTITY FOUR (4) YEARS AFTER THE TRANSACTION AT ISSUE.

Appellants' argument for admissibility of the sale four years after the fact by "a successor" of Diversified must fail for several reasons. The sale at issue occurred more than four years after the transaction at issue in this case, and involved a third-party who had obtained the property from Diversified. Appellants argue that this evidence somehow makes their fraud acceptable. This evidence was properly precluded under Rules 402 and 403 of the Utah Rules of Evidence.

Rule 402 of the Utah Rules of Evidence expressly provides that "[e]vidence which is not relevant is not admissible." The evidence regarding the value of the property when it was sold by this third-party many years after the transaction at issue is not relevant to the issues in this case. Appellants' current argument is that this evidence should have been admitted to consider what "the transaction brought to Diversified".[20] Yet Appellants were allowed to show "what the transaction brought to Diversified" as Appellants were allowed to introduce all evidence regarding the value of the building at the time of the transaction, including the testimony of an appraiser regarding his opinion as to the value of the property at the time of the transaction. [TT 573, 576-577] The jury properly chose to disregard that evidence which was tainted with the Appellants' fraud, including that they had failed to disclose to the appraiser that University Properties was purchasing the property from First Security for $700,000 immediately prior to re-selling the property to Diversified. [TT 580-581]

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[20] Appellants' argument regarding this evidence also has been waived. Appellants never raised the issue that this evidence was somehow pertinent to the issue of punitive damages. Instead, at trial Appellants argued that the evidence should be allowed to refute the fraud damages being claimed by Diversified and the trial court granted a pretrial motion in limine to exclude this evidence. Appellants never raised that issue with the trial court and never sought to introduce this evidence at any time, not even after the jury found punitive damages appropriate and the supplemental evidence pertaining solely to punitive damages was being introduced.

The evidence of the subsequent re-sale of the building by a third-party is nothing more than an improper attempt by Appellants to benefit from Diversified's efforts in improving the building, obtaining tenants for the building, and perhaps a fortuitous escalation of real estate values in Utah County. Clearly had the market declined and the property been worth less several years after the transaction at issue, Appellants would not be amenable to paying more in punitive damages. Nor should they be asked to do so. Fluctuations in the value of the building are simply irrelevant to Appellants' conduct and the impact that conduct had on Diversified.

In addition to the foregoing, evidence of a sale by another party four years later was properly excluded under Rule 403 of the Utah Rules of Evidence as it would have resulted in confusion of the issues, misleading of the jury, and an unnecessary vexation of the proceedings. The evidence of the moneys received at the subsequent sale would have required a substantial amount of evidence regarding the vast improvements and significant efforts by Diversified (and others) which contributed to the increase in the value of the building, not to mention the various forces that impacted the Utah county real estate market during that period of time.[21] The evidence of the re-sale of the building four years down the road is of no probative value, and was properly precluded under Rules 402 and 403 of the Utah Rules of Evidence.

6. THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE OF APPELLANT KNAPP'S SETTLEMENT OFFER TO REPURCHASE THE BUILDING FOR THE PRICE PAID BY DIVERSIFIED AFTER DIVERSIFIED HAD ACQUIRED AND IMPROVED THE PROPERTY.

The evidence that "Knapp offered to completely undo the transaction" appears to be referencing an event in which Knapp claims he met with Diversified and its former counsel, and that at that meeting Knapp offered to purchase the building from Diversified for the same price

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[21] Appellants completely ignore that there were substantial expenses incurred by Diversified and others during the four-year period between the purchase by Diversified and the re-sale by the third-party. Appellants' conclusion that there was "a hefty 13.2% return on its investment" fails to account for these expenses which would result in a lower return on investment. It also fails to mention what the return on investment was with respect to other properties in the same area which were not tainted by fraud.

which Diversified paid for the building in June, 1992. This offer to compromise occurred after Diversified was forced to incur expenses in unraveling the fraud, and had made improvements to the building. Moreover, Knapp's offer to resolve this dispute was only an offer to pay Diversified the amount it had paid for the building sometime earlier, and it would not have made Diversified whole. [R1299-1303]

Appellants' argument for admissibility of this evidence is contrary to Rule 408 of the Utah Rules of Evidence and, if followed, would make bad law. The argument assumes that the perpetrator of a fraud, upon being discovered, can relieve himself of liability by simply offering to repurchase the subject of the fraud. That is, Appellants would have this Court rule that a defrauded party can either affirm the fraudulent induced contract (and not sue for damages) or rescind the contract placing themselves back to the position they were in at the time of the fraud. Thus, the tortfeasors committing fraud would be immune from any liability as they would either enjoy the fraudulently induced deal or they would simply have to return the defrauded party to the status quo existing prior to the time of the agreement. Fortunately, the law is to the contrary.

Moreover, the Appellants' proposition would be eminently bad law in a case such as this where Appellants see nothing morally wrong in what they did. Appellants continue to justify their fraud stating "Plaintiff was induced into a great deal."[22] Thus, the Court cannot rely on Appellants' moral compass to prevent future fraudulent conduct. Rather, the Court needs to take away any economic incentive Appellants may have to commit fraud. If the perpetrator of the fraud can avoid liability by simply offering to repurchase the object of the fraud after his fraud is discovered he has no economic disincentive to commit fraud. That is why this Court has emphatically stated that the election to rescind belongs to the victim. E.g., Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980); see also Pace v. Parish, 247 P.2d 273 (Utah 952). The perpetrator cannot force the victim to

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[22] It begs the question that if everyone knew Diversified was getting such a great deal, why didn't Knapp and University Properties sell it to someone else or even hold onto it and make more money? To the contrary, Knapp testified he would not have exercised his option for his own investment.

rescind and it would be ludicrous to allow him to argue to a jury that because the plaintiff would not be forced the defendant should be relieved of liability.

7. IN ANY EVENT, APPELLANTS HAVE NOT AND CANNOT SHOW THAT THE EXCLUDED EVIDENCE WAS HARMFUL.

Finally, even assuming that there was some evidence that was improperly excluded by the trial court, Appellants' appeal must fail as they have failed to establish that any error was "harmful error". To meet this burden, Appellants must establish that "the likelihood of a different outcome in the absence of the error is 'sufficiently high as to undermine confidence in the verdict." Jouflas v. Fox Television Stations, Inc., 927 P.2d 170, 173 (Utah 1996)(quoting State v. Knight, 734 P.2d 913, 920 (Utah 1987)); see also State v. Wetzel, 868 P.2d 64, 67-70 (Utah 1993)(improper evidence ruling reversed only if showing of prejudice (i.e., "reasonable likelihood that the error affected outcome of the proceedings")). Appellants do not and cannot make this showing.

8. THE TRIAL COURT ERRED IN TERMINATING THE JUDGMENT LIEN SIMPLY BECAUSE APPELLANTS POSTED A SUPERSEDEAS BOND.

The issue of termination of a judgment lien is governed by section 78-22-1(5) of the Utah Code which provides in pertinent part:

> (5)(a) If any judgment is appealed, upon deposit with the court where the notice is filed of cash or other security in a form and amount considered sufficient by the court that rendered the judgment to secure the full amount of the judgment, together with ongoing interest and any other anticipated damages or costs, including attorney's fees and costs on appeal, the lien created by subsection (2) shall be terminated as provided in Subsection 5(b).

Subsection 5(b) provides:

> (b) Upon the deposit of sufficient security as provided in Subsection 5(a), the court shall enter an order terminating the lien created by the judgment under Subsection (2) and granting the judgment creditor a perfected lien in the deposited security as of the date of the original judgment.

The Appellants argue, without authority, that the "other security" requirement of subsection 5(a) is a supersedeas bond. Their argument fails for several reasons. First, had the legislature intended the term "other security" to mean supersedeas bond", they would have said so. The significance of the statute's failure to specifically reference a supersedeas bond is heightened if, as Appellants argue, this "other security" is typically a supersedeas bond. Had the legislature intended a

supersedeas bond to constitute the "other security" necessary for terminating the judgment lien, it could have (and would have) clearly so indicated.

In fact, the legislative history of the statute shows that the lawmakers knew what a supersedeas bond was and that the bond's purpose was altogether different from the "cash or cash equivalents" they proposed support a release of a judgment lien. The Senator sponsoring the bill in the senate stated that the term "cash or other security" in the statute means "cash or cash equivalent, ready cash". See Senate Floor Debate on HB 142, Tape 29, February 17, 1999. He further stated:

> Right now we don't have that ability in the code [to obtain release of the lien when the judgment amount is far less than the value of the real estate]. We only have the ability to file a supersedeas bond which would only stay the execution on the property and that's why we present S.B. 142."
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> Id.

Second, section 78-22-1(5)(b) provides for termination of a judgment lien only by the court "granting the judgment creditor a perfected lien in the deposited security as of the date of the original judgment". The statute, therefore, necessarily requires something more than a bond. It contemplates by its very language, and consistent with the legislative history, that the judgment debtor will deposit with the court property which they own and to which a lien can attach. Given that the trial court could not grant Diversified a perfected lien in the supersedeas bond filed with the court, the requirements of section 78-22-1(5) have not been met and the judgment lien should not be terminated.

Finally, there are numerous Utah cases which demonstrate the true effect of filing a supersedeas bond, namely to stay the execution of the judgment. Clearly if the filing of the supersedeas bond resulted in the termination of the judgment lien, there would be no case law indicated that the "sole purpose of a supersedeas bond is to stay the enforcement of the judgment or decree pending the appeal." Skeen v. Pratt, 48 P.2d 457, 458 (Utah 1935); U-M Investments v.

Ray, 701 P.2d 1061, 1063 (Utah 1985).[23]

VII. STATEMENT OF THE ISSUES RAISED BY THE CROSS-APPEAL

Cross-Appeal Issue No. 1 (Improper Reduction of Negligence Damages):

Did the trial court err in reducing the amount of damages awarded by the jury for negligence when there was evidence to support the jury's verdict?

Standard of Review: A jury's award of damages cannot be reduced or set aside if there is an evidentiary basis for the decision. Thus, the jury's award must be upheld if there is any probative facts to supports its conclusion. Security Dev. Co. v. Fedco, Inc., 462 P.2 d 706, 709-710 (Utah 1969.

Cross-Appeal Issue No. 2 (Improper Grant Of New Trial/Remittitur):

Did the trial court err in granting a new trial or remittitur based solely on the ratio of the award of punitive damages to compensatory damages when there was no evidence that this properly instructed jury acted on improper passion or prejudice?

Standard of Review: This is an issue of law which is reviewed for correctness.

VIII. SUMMARY OF ARGUMENTS PERTAINING TO CROSS-APPEAL

POINT 1: There Was Evidence To Support The Jury's $210,000 Award On The Negligence Claim And The Trial Court Erred In Remitting That Award To $65,000: A jury's verdict should not be reduced provided there is evidence which would support the verdict. Such was the case here as the evidence showed, inter alia, that the Building could have been purchased for $100,000 less than the $700,000 price, the increased purchase price lowered the return on investment by $236,062.51 assuming a ten-percent return for 7 ½ years, that there was a built-in commission of $47,100 which Appellants did not earn, and Appellants received in excess of $30,000 as kickbacks and commissions to which they were not entitled. Clearly there was

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[23] Moreover, the Appellants' argument that the judgment is essentially double secured it without merit. A supersedeas bond clearly does not guarantee payment as there could be any number of things arise which would prevent payments. For instance, the bonding company may not have sufficient assets to pay the bond when it becomes due several years down the road, or the bond may expire prior to the running of the appeal. Another significant concern is that the bonding company could challenge its obligation under the bond as was done in the U-M Investments case cited by Appellants.

sufficient evidence to support the jury's $210,000 award and that amount should be reinstated.

POINT 2: The Trial Court Erred In Granting A New Trial/Remittitur When There Was No Evidence The Jury Acted On Passion Or Prejudice: The evidence before the trial court established that the jury, which was very conscientious, was properly instructed and granted a punitive damages award which, while large, was clearly supported by the evidence in this case. The trial court nonetheless granted a new trial/remittitur based solely on the amount of the punitive damages award. Given that the jury's punitive damages award was clearly supported by the evidence requires that the trial court's granting of the new trial was improper and the entire award should be reinstated.

IX. ARGUMENTS PERTAINING TO CROSS-APPEAL

1. THE TRIAL COURT ERRED IN REMITTING THE JURY'S AWARD OF NEGLIGENCE DAMAGES IN THE AMOUNT OF $210,000 TO $64,000 WHEN THERE WAS EVIDENCE TO SUPPORT THE JURY'S VERDICT.

In order to avoid invading the province of the jury a trial court should set aside the verdict only if it is shown that "there was a plain disregard by the jury of the instructions of the Court or the evidence". E.g., Saltas v. Affleck 105 P.2d 176, 178 (Utah 1940). That a trial court judge merely disagrees with the jury verdict is not a proper basis for granting a new trial. King v. Fereday, 793 P.2d 618, 621 (Utah 1987). A jury is allowed wide discretion in awarding damages and courts must defer to the jury's determination of damages unless: (1) the jury disregarded competent evidence; (2) the award is so excessive beyond rational justification as to indicate the effect of improper factors in the determination; and (3) the award was reached under a misunderstanding. Brown v. Richards, 840 P.2d 143, 153 (Utah App. 1992). No errors of the type justifying invasion of the jury's province are present in this case. Moreover, the party challenging the verdict has the burden to marshal the facts in favor of the verdict and then show why those facts are insufficient to support the verdict. E.g., Ong, 850 P.2d at 456-457. Appellants have failed to carry this burden of marshaling the facts. The trial court should not have speculated as to the manner by which the jury arrived at its negligence damage award; therefore, the jury's verdict

should be affirmed.

A) Substantial Evidence Supports The Jury Finding Of Negligence.

There can be no question as to the fact of damage caused by Appellants' negligence. All Appellants failed to follow several of the standards established in the real estate industry, both by regulation and by custom, the violation of which caused the damage to Diversified. As Diversified pointed out to the jury, there were two things wrong with the way the Temple View Terrace transaction was handled by Appellants. There was the express fraud by Turner, ratified by Knapp, University Properties and The Haws Companies, about the price Knapp was paying First Security Bank. But, as Diversified pointed out to the jury, that express fraud was just the cherry on the banana split. The real problem was much deeper. It was the failure of Appellants -- real estate professionals representing Diversified -- to get the best possible deal they could for Diversified from First Security Bank. Instead Appellants Knapp and Defendant Turner inserted themselves into the middle of the transaction, boosted the price, and agreed to split the profits.

That scheme was the crux of Diversified's claim. Moreover, it was argued to the jury and the evidence showed that the scheme would have been stopped in its tracks had Appellants not neglected to disclose that Knapp was a real estate agent; that Knapp and Turner were both licensed with The Haws Companies; or that Turner was a partner with Knapp and therefore a principal in the deal. Thus, Turner and Knapp were unquestionably negligent in failing to act honestly in getting the best deal they could for their client from First Security rather than injecting themselves into the deal and agreeing to split the profits. Their negligence continued in failing to disclose this unsavory relationship, and in failing to make these numerous other disclosures referenced above.

The Haws Companies were also shown to be negligent. For instance, the jury was shown that Mr. Haws, president of the Haws Companies, knew about this transaction, and was concerned that Mr. Knapp would flip the property and not make proper disclosures. Also, Mr. Grow testified that The Haws Companies were negligent in the way they hired Turner without doing a modicum of investigation that would have revealed his propensity to fall short on ethical practice. He also

testified The Haws Companies was negligent in hiring the young Knapp and failing to give him particularized training because of his prior experience as a "wheeler dealer." Mr. Grow saw it as extremely important in order to give Knapp active supervision that he be specifically taught the special duties that he now was bound to follow as a licensed real estate salesman that did not apply in his prior activities. Yet Knapp testified in his deposition, as confirmed at trial, that The Haws Companies provided him "zero, no training, no discussion about training, no manuals, no support, no nothing." Both Mr. Grow and Mr. Jon Brown from the Division of Real Estate testified that putting the questionable Mr. Turner and the young untrained Mr. Knapp in the Provo office, 40 miles from The Haws Companies, without an on-site broker/supervisor, was negligent. The Haws Companies was also negligent in not more closely supervising this particular transaction when, as Mr. Haws put it, he was concerned that Mr. Knapp might flip this property and not make the proper disclosures.[24]

That negligence was attributable to The Haws Companies through its president, Mr. Richard Haws, who was Mr. Turner's principal broker just prior to his engagement with The Haws Companies and who was personally involved in the hiring of Mr. Turner and Mr. Knapp.

B) The Negligence Award of $210,000.00 Is Well Within the Range of Decision Supported by the Evidence.

Because damage assessment is peculiarly a jury function, trial courts should exercise caution in setting aside a verdict and ordering a new trial on the basis of excessive damages. Batty v. Mitchell, 575 P.2d 1040, 1043 (Utah 1982); Andreason v. Aetna Cas. & Sur. Co., 848 P.2d 171, 174 (Utah App. 1993). The trial court should grant a new trial "only where it is obvious that the jury lacked a reasonable basis for its decision. . .," Id.; Crookston I, 817 P.2d at 805 (the evidence, when viewed in the light most favorable to the prevailing party, must be insufficient to support the verdict).

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[24] There was also competent evidence that The Haws Companies knew about the re-sale of the building to Diversified before closing. [TT 405-407] This further adds to The Haws Companies' duties and obligations to Diversified.

As to the quantum of evidence required, this Court has said that the plaintiff must prove the fact of damages by a preponderance of the evidence, and the amount of damages by approximations and projections that rise above mere speculation. The Court should only determine whether a sufficient evidentiary basis exists to support the award:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does an error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.
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> Security Dev. Co. v. Fedco, Inc., 462 P.2d 706, 709-10 (Utah 1969)(quoting Lavender v. Kurn, 327 U.S. 645, 653 (1945)).

Based on the evidence the jury easily arrived at the $210.000 negligence damages. Diversified argued that had Appellants done their duty to get the best price possible for the Diversified, rather than setting up the scam, Appellants might well have negotiated a purchase from First Security at less than the $700,000.00 Mr. Knapp paid.

In cross-examination by Appellants' counsel, Mr. Parish testified the building had a value between $600,000 and $700,000 and that Mr. Parish wanted to offer First Security $600,000 for the property. [TT 53, 132-133] Mr. Parish was dissuaded from doing so by the whole fraudulent scheme of Knapp being a supposed purchaser and having purchased for $770,000. Since the owner of the property is competent to testify to its value, e.g., State v. Ballenberger, 652 P.2d 927, 931 (Utah 1982); Utah v. Dilree, 478 P.2d 507, 508 (Utah 1978), the jury would be justified in concluding that had Defendant Turner, and Appellants Knapp and The Haws Companies been doing their duty toward Diversified they could have purchased this property for $600,000.

Diversified, through Mr. Parish, also testified that the building was being purchased for investment and to obtain a return on investment, and that Diversified was going to fill the Building and make a substantial profit. [TT 137]

The difference between the price before Appellants' machinations and negligence and the price Diversified actually paid is $185,000.00, representing the lost investment value caused by Appellants neglecting their duty to zealously pursue Diversified's interests and get the best deal possible from the sale. From that $185,000.00 the jury was instructed to deduct the $71,336.00 in fraud damages leaving $113,664.00.

Mr. Jud Harward, an appraiser retained by Appellants, testified (and it also appeared in his appraisal that was introduced into evidence as Exhibit 87) that the expected rate of return on such an investment is ten to twelve-percent. It was also clear in this record that this transaction occurred in June, 1992 and Diversified had been deprived of the money and return on investment for seven and one-half years. Applying simple math, the lost investment value of the $113,664.00 over seven and one-half years at 12% is $265,924.35, and the same at ten-percent interest is $236,062.51. Well above the $210,000.00 the jury actually awarded.[25]

This analysis does not even take into account other elements of negligence damages the jury may have considered. The jury properly could have concluded that Appellants did not earn the $21,000 commission actually paid them when, instead of pursuing their clients' interest, they pursued their own. Likewise, the jury could properly conclude that the price should be reduced by the $47,100.00 commission Mr. Haws testified was built into the sale. See Exhibit 51.

Also, the jury was shown that Appellants received a $5,000.00 kickback from Diversified's bank that should rightly have gone to Diversified in the form of reduced loan costs. The jury was also presented evidence that First Security Bank returned $5,000.00 earnest money when Diversified paid the $70,000.00. That $5,000.00 rightly should have gone to Diversified.

Further, the jury was presented with uncontroverted evidence that Appellants, notably The Haws Companies, had a duty, once Diversified had reported to them the fraud that had occurred, to

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[25] The jury could easily have reached the $210,000.00 figure even if they set the initial value at something higher than $600,000.00. The point is, the $210,000.00 is well within the values the jury had to work with, and how they actually reached the exact value they did is immaterial. Security Dev. Co. v. Fedco, Inc., 462 P.2d 706, 709-10 (Utah 1969).

seek redress for Diversified; to furnish information about what had happened; and help Diversified get the problem resolved. [TT 650] Instead, The Haws Companies asked for and pursued diligently their share of the commission and left Diversified to fend for itself. Mr. Parish testified that Diversified spent considerable personal time gathering facts and investigating the incident, and that attorneys then had to be hired to pursue the matter. [TT 85-86] All these factors made up elements the jury properly considered in answering the Special Verdict's question as to the amount of additional damages sustained by Diversified as a proximate result of the negligence. The evidence is more than sufficient to support the jury's verdict awarding damages for negligence and the jury's award of $210,000 for the negligence award should be reinstated.

2. THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL OR REMITTITUR BASED SOLELY ON THE RATIO OF THE AWARD OF PUNITIVE DAMAGES TO COMPENSATORY DAMAGES WHEN THERE WAS NO EVIDENCE THIS PROPERLY INSTRUCTED JURY ACTED ON IMPROPER PASSION OR PREJUDICE.[26]

This jury was very conscientious in its service did not act on passion or prejudice. The fact that the jury took all day to consider the verdict; asked specific questions about the damages they awarded; and awarded separate damage amounts against each Defendant shows diligence, discernment and analysis rather than passion or prejudice. The jury's efforts as reflected in the foregoing should not be undone by the trial court substituting its judgment for jury's decision. The only challenge to the jury's verdict and the sole basis upon which the trial court conditionally granted the motion for new trial was because it determined that the punitive damages were deemed by the trial court to be "excessive".

This Court has cautioned, however, that "[i]t is seldom that the amount of the verdict standing alone is so excessive as to indicate passion or prejudice". Saltas v. Affleck 105 P.2d 176, 178 (Utah 1940). Moreover, contrary to Appellants' argument that the punitive damages in this

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[26] It should be stressed that Diversified only challenges the propriety of the trial court granting a new trial/remittitur, not the amount of the remittitur. If this Court rules that the trial court had authority to remit the punitive damages award, then Diversified concedes that the amount of the remittur as supported by the trial court's Memorandum Decision was proper.

case cannot be upheld, this Court has expressly rejected an absolute ceiling approach to punitive damages because "the absolute ceiling approach is too mechanical and could potentially defeat the very purpose of punitive damages." Crookston I, 817 P.2d at 809.[27] Given the analysis set forth above with respect to the issue of punitive damages, the jury clearly acted within its province in awarding the punitive damages in this case and the trial court erred in granting the motion for new trial or, in the alternative, remitting the punitive damages award.

In Crookston v. Fire Ins. Exch., 817 P.2d 789, 805 (Utah 1991) ("Crookston I"), this Court set forth the requirements for a trial court when facing challenges to punitive damages awards. These requirements vary depending on the amount of punitive damages as a ratio to actual damages awarded. If the punitive damages award falls within the range consistently upheld by this Court,[28] the trial court may assume that the award is not excessive and in denying a motion for new trial the trial court need not give any detailed explanation for its decision. Id. at p. 811.

While not expressly stated by the Court, the purpose of the ratio analysis is to provide a shorthand way of determining if the jury analyzed the case and carefully weighed the facts, or was simply carried away by passion or prejudice. If the award is within the ratios, the trial court can assume that passion or prejudice was not a factor and simply uphold the verdict. If the award exceeds these ratios the appellate court needs the skilled analysis of the trial judge, who was present, exposed to the same witnesses and evidence as the jury, in order to understand that the jury properly applied the law to the facts and rationally reached its verdict.

In this case the jury, following the trial court's instructions, returned four separate punitive damage awards. When compared to the magnitude of injury the jury saw in this case the ratio of

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[27] Moreover, the Crookston I Court itself described its analysis of punitive damages as a "soft" ceiling. Id. at p. 813.

[28] This Court has noted that punitive damages below $100,000 are routinely upheld if the ratio of punitive to actual damages is 3 to 1 or less and, when the punitive award exceeds $100,000, there is some inclination to overturn awards having a less than 3 to 1 ratio. Crookston I, 817 P.2d at 810.

punitive damages to compensatory damages exceeds 3 to 1 only with respect to Turner and Knapp.[29] Therefore, the trial court could have properly upheld the damage awards against The Haws Companies, and possibly University Properties without analysis. Crookston I, 817 P.2d at 810-811. Diversified has nonetheless provided the analysis required as to all Appellants for the Court's convenience.

If the punitive damages award exceeds the ratios set by this Court's prior decisions, the trial court is not bound to reduce it. Id. at p. 811; see also Crookston v. Fire Ins. Exch., 860 P.2d 937, 940 (Utah 1993)(upholding ratio of punitive damages to hard compensatory damages with ratio exceeding 10 to 1). Instead, the trial judge need only make "a detailed and reasoned articulation of the grounds for concluding that the award is not excessive in light of the law and the facts." Crookston I, 817 P.2d at 811. "In sum, the trial judge's articulation should explain why the award is not excessive despite the fact that it exceeds the general pattern of awards upheld in our prior cases." Id.

In assessing whether a punitive damages award is excessive, the trial court is to consider one or more of the following factors:

1) the relative wealth of the defendant;
2) the nature of the alleged misconduct;
3) the facts and circumstances surrounding such conduct;
4) the effect thereof on the lives of the plaintiff and others;
5) the probability of future recurrence of the misconduct;
6) the relationship of the parties; and
7) the amount of actual damages awarded.

E.g., Crookston I, 817 P.2d at 808; Von Hake v. Thomas, 705 P.2d 766, 771 (Utah 1985). In addition to the foregoing factors, a trial court may find other compelling factors for upholding the award which further the purposes of punitive damages "'by punishing and deterring outrageous and malicious conduct [or conduct which manifests a knowing or reckless indifference toward, and disregard of, the rights of others] which is not likely to be deterred by other means.'" Crookston I,

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[29] Defendant Turner did not filed a post-trial motion and did not appeal. Therefore the Court should simply reinstate the jury's award against Mr. Turner.

817 P.2d at 811 (citations omitted). In this case one such compelling factor is present. It is Appellants' propensity to justify their actions. To this day Appellants have never acknowledged the real fraud. They still argue that Turner was a bad guy who lied, but they never lied. Knapp refuses to acknowledge that it was wrong for him to pretend (and misrepresent) that he was not a real estate agent; that it was wrong for him to pretend not to be a partner with Diversified's fiduciary, Turner; or that it was wrong for him to help cover up Turner's lies that inured to his benefit. If the Court allows the reduction of this jury verdict to stand, Knapp will take it as the Court buying into his story the jury saw through. The jury's award must be reinstated so that there can be no question in Knapp's mind, or in the minds of the other Appellants, or the larger real estate profession, that not only is lying wrong, but being involved in a deceitful ruse is also wrong and truth and forthrightness is required.

A) A Consideration Of The Relevant Factors Demonstrate The Propriety Of The Amount Of Punitive Damages The Jury Awarded Against Each Of The Moving Appellants.

An examination of these factors establish that the amount of punitive damages awarded by the jury was not excessive.

1) The Punitive Damages Award Against Appellant Knapp Is Not Excessive Under Utah Law.

Actual damages found in this case amount to $281,336.00, and prejudgment interest for the 7 ½ years Appellants litigated with Diversified amount to in excess of $55,000, for a total damage award in excess of $336,336.00.[30] The jury awarded punitive damages against Appellant Knapp in the amount of $1,750,000; thus, the punitive to actual damage ratio with respect to Knapp is 5.2 to 1. An examination of the seven factors demonstrate that, under the circumstances of this case, this ratio is an appropriate award.

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[30] Appellants argue that only the fraud damages are to be considered in determining the punitive damages ratio because the negligence damages are "soft" damages. That is not correct because "soft" damages in the punitive damages context refer to "pain and suffering". As shown in Sections VI, 4., supra, the negligence damages the jury awarded were for the value lost by Appellants' fraudulent scheme.

i. Appellant Knapp's Relative Net Worth Exceeded $5,000,000.00.

The first factor to consider is the relative net worth of Appellant Knapp which is quite high. The undisputed evidence at trial was that, estimated conservatively, his net worth exceeded $5,000,000.00. Thus, a higher amount of punitive damages than usual would be warranted to ensure that the misconduct found so egregious by the jury is properly punished and deterred.

ii. The Nature Of The Misconduct, The Facts And Circumstances Surrounding The Conduct, And The Effect On Diversified And Others Justified A Substantial Punitive Damages Award.

The next three factors all focus directly on the Appellant's misconduct and its impact on others. As the evidence at trial established, Appellant Knapp's misconduct was extremely egregious. For instance, Knapp knowingly interjected himself into this fraudulent scheme in an attempt to bilk Diversified out of a substantial sum of money by tying up the building after learning that Diversified was interested in the building. Instead of assisting Diversified to deal at an arms-length with First Security, as was his duty as a real estate agent in the very brokerage who represented Diversified, Knapp tied up the building with Turner (someone with whom he had done deals before) and forced Diversified to deal directly with himself for a quick profit. Moreover, although Knapp refused to admit on the witness stand that (even in spite of his sworn deposition testimony) he did not intend to purchase the building himself, the evidence was clear that he had no intent to close on this building. To the contrary, the sole objective was to use Diversified's money to buy this building making a substantial profit at Diversified's expense.

In addition, the evidence was clear that Knapp made misrepresentations and failed to make proper disclosures to Diversified in connection with the transaction, and affirmatively covered up other nondisclosures and lies. When asked by Mr. Parish in the beginning whether he was a real estate agent, Appellant Knapp lied and said "no". Moreover, he never made the disclosures required under Utah law given his status as a licensed real estate agent. And when he learned that Turner had lied to Diversified about the option price on the building, he simply told Turner that "you better hope they don't find out." But it doesn't stop there. Instead of disclosing the truth to

Diversified, Knapp went to great lengths to keep the two closings separate so this key information would not be discovered by Diversified. Also, there was evidence from which the jury could properly infer Appellant Knapp told Turner during a telephone conversation to misrepresent to Diversified that Knapp was paying $770,000 for the option. And finally, during the trial itself all Appellants used the tainted appraisal of Mr. Jud Harward which was based on misrepresentations and nondisclosures of Turner to attempt to escape liability. The foregoing evidence establishes that Knapp's misconduct was very central to the fraudulent scheme in this case, continued through trial, and is worthy of a severe punishment.

iii. The Probability Of Future Recurrence Of This Misconduct.

The next factor likewise argues heavily in favor of a heightened award of punitive damages. That Appellant Knapp argues before this Court that his conduct is not likely to recur because he was suspended from real estate practice for five (5) years (which suspension has now ended) demonstrates his continued effort not to own up to his wrongdoing. Moreover, as the trial court stressed in its Memorandum Decision [R2081-2086], the evidence was clear that Knapp had engaged and continues to engage in numerous real estate transactions a year. Throughout the trial Appellant Knapp took the position that he was involved in this transaction with Diversified not as a real estate agent, but solely as a principal acting on his own account. If that is true, the probability of future recurrence of this misconduct is very likely. Particularly given that Appellant Knapp never owned up or even recognized that something wrong had occurred. As discussed above, Knapp actively sought to conceal the fraud and even went so far as to instruct the title company not to provide any information to Diversified. Knapp attempted to justify his actions by taking the position that it was "none of their business" what we paid even after he discovered the misrepresentation had been made. Likewise, upon learning about an illegal kickback to Turner on the loan he was angry, not that Diversified had been wronged, but that he didn't get his share of the kickback. This demonstrates an extreme "disregard of the rights of others" which punitive damage awards aim to punish.

Even more egregious is Appellant Knapp's brazen attitude about his misconduct, including during the trial of this matter. Despite his sworn deposition testimony that he knew before the closing that Turner had lied to Diversified about Appellant Knapp's purchase price for the building, Appellant Knapp would not admit to that simple fact. Moreover, after the Court went to great lengths to provide Appellant Knapp with a fair trial by precluding evidence about the Division of Real Estate's investigation, Appellant Knapp abused that ruling to his advantage by lying about making the statement that Mr. West had not provided adequate supervision over Appellant Knapp's activity. Even though Diversified's counsel had the recorded conversation wherein that statement was made, Appellant Knapp abused the trial court's evidentiary ruling when he denied on three occasions that he even made the statement. Finally, in an apparent attempt to argue contributory negligence, Appellants took the position and argued in essence "I lied to you but you should have figured it out", demonstrating their utter disregard for Diversified's plight.

Appellants argument that Appellant Knapp has surrendered his license so it is unlikely he will engage in this type of misconduct in the future is likewise without merit for several reasons. First, Knapp maintained throughout that he was not even acting as an agent in this transaction. Certainly fraud of this type, whether practiced by a real estate professional or by a layman, is unacceptable. Second, Knapp is presently eligible to reapply to be a real estate agent or broker. Finally, and most importantly, the evidence is clear that Appellant Knapp is still regularly engaging in real estate transactions and, given his affirmative misconduct and lack of repentance in this case, the probability of future recurrence of the misconduct is undoubtedly high. Given Knapp's propensity to self-justification, the Court must carefully guard against any suggestion that this conduct is condoned. The reduction in the jury's award of punitive damages, if allowed to stand, would tend to have such an effect.

iv. The Relationship Of The Parties Justifies A Higher Punitive Damages Award.

The next factor that must be considered in assessing punitive damages is the relationship of the parties. The evidence in this case showed that Defendant Turner and Appellant Knapp were

real estate agents for The Haws Companies who were representing Diversified in connection with this transaction. As such, they owed fiduciary duties to Diversified and were supposed to be acting as Diversified's agent and in its best interests. The fact that Knapp failed to disclose his fiduciary duty to Diversified makes his conduct worse, not better, a fact that appears lost on Mr. Knapp. Moreover, Appellants Knapp and Defendant Turner had previously "done deals together" similar to the undisclosed scheme in connection with the transaction at issue. None of these relationships were disclosed to Diversified.

v. The Punitive Damages Ratio Awarded Against Appellant Knapp Is Proper.

The punitive to actual damages ratio awarded against Appellant Knapp by the jury was 5.2 to 1.[31] This ratio is clearly supported given the evidence adduced at trial when analyzed under the foregoing factors; therefore, it is appropriate. E.g., Crookston I, 817 P.2d at 810-811; Crookston, 860 P.2d at 940 (upholding ratio of punitive damages to hard compensatory damages with ratio exceeding 10 to 1); see also VanDyke v. Mountain Coin Mach. Distrs., Inc., 758 P.2d 962, 965-966 (Utah App. 1988)(upholding punitive damages at ratio of 50 to 1 appropriate).

2) The Punitive Damages Award Against Appellant University Properties Is Not Excessive Under Utah Law.

The jury awarded actual damages in the amount of $281,336.00, and prejudgment interest in excess of $55,000, for a total damage award in excess of $336,336.00. The jury also awarded punitive damages against Appellant University Properties in the amount of $1,000,000; thus, the punitive to actual damage ratio with respect to Appellant University Properties is less than 3 to 1. Thus, the trial court need not have given further analysis in order to uphold this award. Moreover, as with Knapp, an examination of the seven factors demonstrate again that, under the circumstances of this case, this ratio is an appropriate award.

---

[31] It should also be noted that there was uncontroverted evidence that Knapp had a substantial net worth conservatively estimated in excess of $5,000,000.00. [R2086]

i. Appellant University Properties' Relative Net Worth Was, Based On The Evidence At Trial, Substantial.

Contrary to Appellants' argument, there was substantial evidence at trial regarding the net worth of Appellant University Properties. Appellant Knapp testified he was the President of University Properties which was formed November, 1990 for the purpose of acquiring a convenience store in Park City which, according to Appellant Knapp, was "a pretty big deal".[TT 698][32] Appellant Knapp further testified that University Properties is presently conducting business doing real estate rentals, real estate purchases and sales, making loans, and it owns numerous properties including at least two (2) convenience stores, an office building, and a 96-unit apartment building. [TT 698-700]

In addition, Defendant Turner testified that Appellant University Properties could have purchased this $700,000 building without a loan, and that banks would make loans to University Properties without a loan application. Thus, the evidence pertaining to University Properties' net worth was more than adequate to support the jury's punitive damages verdict, particularly given its less than 3 to 1 ratio.[33]

ii. The Nature Of The Misconduct, The Facts Surrounding The Conduct, And The Effect On The Plaintiff And Others Justified A Substantial Punitive Damages Award.

The next three factors all focus directly on Appellant University Properties' misconduct and

---

[32] Appellant Knapp also testified that University Properties has engaged in the businesses of buying and selling property, renting property, and managing property for Appellant Knapp and others. [TT 698]

[33] The reason Diversified's expert, L. Deane Smith, C.P.A. did not offer an opinion as to the net worth of University Properties is because University Properties failed to produce to Diversified various financial documents despite being ordered by the trial court to do so. Diversified brought a Motion to Compel moving to compel all Defendants to produce various financial information relevant to the punitive damages issue. The trial court granted that Motion to Compel and over the next several months the Appellants other than University Properties and Mr. Turner complied. Having failed to produce financial information in violation of an express court order to do so, University Properties should not now be heard to complain that Diversified failed to introduce that very information into evidence.

its impact on others. As the evidence at trial established, Appellant Knapp was President of Appellant University Properties and that Defendant Turner was the agent of University Properties in this transaction. As such, the analysis set forth above with respect to Appellant Knapp is likewise applicable in large part to University Properties and will not be repeated here. In sum, the evidence adduced at trial established that Appellant University Properties' misconduct was very central to the fraudulent scheme in this case and is worthy of a severe punishment.

iii. The Probability Of Future Recurrence Of This Misconduct.

This next factor, as with Appellant Knapp, likewise argues heavily in favor of a heightened award of punitive damages. The evidence was clear that Appellant University Properties, acting through Appellant Knapp, remains currently engaged in purchasing and selling real estate, and making loans. Thus, the probability of future recurrence of this misconduct is very likely.

iv. The Punitive Damages Ratio Awarded Against Appellant University Properties Is Proper.

The punitive to actual damages ratio awarded against Appellant University Properties is less than 3 to 1. This ratio is clearly supported given the evidence adduced at trial when analyzed under the foregoing factors; therefore, it is clearly appropriate. E.g., Crookston I, 817 P.2d at 810-811; Crookston v. Fire Ins. Exch., 860 P.2d 937, 940 (Utah 1993)(upholding ratio of punitive damages to hard compensatory damages with ratio exceeding 10 to 1); see also VanDyke v. Mountain Coin Mach. Distrs., Inc., 758 P.2d 962, 965-966 (Utah App. 1988)(awarding punitive damages at ratio of 50 to 1 appropriate).

3) The Punitive Damages Award Against Appellant The Haws Companies Is Not Excessive Under Utah Law.

The jury awarded actual damages in the amount of $281,336.00, and prejudgment interest in excess of $55,000, for a total damage award exceeding $336,336.00. The jury also awarded punitive damages against Appellant The Haws Companies in the amount of $130,500; thus, the punitive to actual damage ratio with respect to Appellant The Haws Companies is less than one-half (½) to 1. Thus, the Court need not give further analysis in order to uphold this award.

Crookston I, 817 P.2d at 811. As with the other moving Appellants, however, an examination of the seven factors demonstrate again that this ratio is an appropriate award.

i. Appellant The Haws Companies' Relative Net Worth Exceeded $522,000.00.

The first factor to consider is the relative net worth of Appellant The Haws Companies. The undisputed evidence at trial was that, estimated conservatively, the net worth of The Haws Companies exceeded $522,000. [R2076] Also, there was evidence that The Haws Companies had been operating for numerous years and had several employees.

ii. The Nature Of The Misconduct, The Facts And Circumstances Surrounding The Conduct, And The Effect On The Plaintiff And Others Justified A Substantial Punitive Damages Award.

The next three factors all focus directly on The Haws Companies' misconduct and its impact on others. As the evidence at trial established, Appellant The Haws Companies' misconduct was worthy of severe punishment. First and foremost, Appellant The Haws Companies clearly and repeatedly ratified the fraudulent transaction after being fully aware of the misconduct that had occurred. For instance, in January, 1993, after the investigation by the Division of Real Estate, Mr. Richard Haws, President of The Haws Companies, sent a letter to Mr. Knapp seeking their share of the profit obtained through this fraudulent scheme.

This ratification in January, 1993 was consistent with The Haws Companies' conduct throughout which exhibited a clear disregard of Diversified's rights. For instance, when Diversified's principals approached it with concerns about the transaction, their response was: "That closed? Where is our commission?" The Haws Companies did not do anything to assist Diversified in rectifying the fraud even though the undisputed evidence at trial was that they had this obligation. Instead, The Haws Companies repeatedly requested its share of the profits.

Next, the evidence at trial showed that Mr. Haws was Turner's principal broker in 1991 when a Division of Real Estate complaint was filed and investigated. At trial, Haws did not admit that he was Turner's principal broker before Turner joined The Haws Companies and it was only after the documentation was introduced into evidence that he conceded the prior relationship with

Turner. The evidence further shows that when the Division of Real Estate complaint against Mr. Turner was filed Mr. Haws did not disassociate with Mr. Turner, and in fact the very next month he passed Mr. Turner to Mr. West and The Haws Companies without disclosing the problem. Appellant The Haws Companies further compounded the problem by failing to provide training or a policy manual, even though the contract with both Defendant Turner and Appellant Knapp allowed The Haws Companies to exercise these controls. Moreover, Appellant The Haws Companies allowed these agents to operate in Provo, some forty (40) miles away even though they regularly failed to attend the weekly sales meetings (the only thing The Haws Companies did to supervise these agents).

Finally, Appellant The Haws Companies did nothing to ensure that the very conduct giving rise to Diversified's claims did not occur even though the evidence demonstrated that The Haws Companies: 1) was told prior to the closings that Appellants Knapp and University Properties were going to acquire the building; 2) knew that there was a history of "flipping" properties; 3) was concerned about a potential "flip" of the building; and 4) was even concerned that proper disclosures would not be made. The foregoing misconduct of Appellant The Haws Companies more than amply supports the jury's verdict.

iii. The High Probability Of Future Recurrence Of This Misconduct.

The next factor likewise argues heavily in favor of the jury's award of punitive damages. The evidence was clear that Appellant The Haws Companies did not see anything wrong with the fraudulent conduct as it repeatedly ratified the transaction in repeated letters and even at the time of Haws' deposition, well after all details of the transaction were known. Even more alarming is the defense raised by The Haws Companies that its conduct was (and is) consistent with industry standards. Undoubtedly the probability of future recurrence of The Haws Companies' misconduct is very likely given its conduct during and after this fraudulent transaction.

iv. The Fiduciary Relationship Between The Parties Justifies A Higher Punitive Damages Award.

The next factor that must be considered in assessing punitive damages is the relationship of

the parties. The evidence in this case showed that Defendant Turner and Appellant Knapp were real estate agents for Appellant The Haws Companies who was representing Diversified in connection with this transaction. As such, they owed fiduciary duties to Diversified and were supposed to be acting as Diversified's agent and in its best interests. Yet Appellant The Haws Companies' failed to take necessary steps to protect the interests of Diversified which clearly demonstrated at least "a reckless indifference toward, and disregard of" Diversified's rights. Moreover, it failed to satisfy its undisputed obligation to assist Diversified to remedy the wrong -- instead it chose to vigorously pursue its commissions from the scheme.

v. The Punitive Damages Ratio Awarded Against Appellant The Haws Companies Of Less Than ½ To 1 Is Clearly Proper.

The punitive to actual damages ratio awarded against Appellant The Haws Companies is less than ½ to 1. This ratio is presumptively not excessive and no further analysis is required. An analysis of the evidence in this case, however, clearly demonstrates that this award is appropriate. E.g., Crookston I, 817 P.2d at 810-811; Crookston v. Fire Ins. Exch., 860 P.2d 937, 940 (Utah 1993)(upholding ratio of punitive damages to hard compensatory damages with ratio exceeding 10 to 1); see also VanDyke v. Mountain Coin Mach. Distrs., Inc., 758 P.2d 962, 965-966 (Utah App. 1988)(awarding punitive damages at ratio of 50 to 1 appropriate).

X. CONCLUSION

Based on the foregoing, the jury did not act improperly on passion or prejudice, and its verdict is clearly supported by the evidence and its award should be reinstated. Thus, the trial court's judgment regarding fraud should be affirmed, and the jury's awards for negligence and punitive damages should be reinstated.

DATED this 20 day of August, 2001.

ATKIN & HAWKINS, P.C.

Blake S. Atkin
Counsel for Diversified

MAILING CERTIFICATE

This is to certify that a copy of the foregoing BRIEF OF APPELLEE/CROSS-APPELLANT was mailed, postage prepaid, this 20th day of August, 2001 to the following:

F. Richards Smith III
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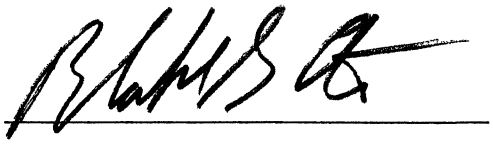
Provo, Utah 84603

Jeffrey N. Walker
HOLMAN WALKER & HUTCHINGS
9527 South 700 East
Salt Lake City, Utah 84070

Gilbert R. Turner
4066 Worthington Drive
Park City, Utah 84060



Tab A

Blake S. Atkin #4466
Scott M. Lilja #4231
Jonathan L. Hawkins #5966
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Telephone: 801-533-0300

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

DIVERSIFIED HOLDINGS CO., L.C., Plaintiff, v. GILBERT R. TURNER, RICHARD M. KNAPP, UNIVERSITY PROPERTIES, INC., a Utah corporation, THE HAWS COMPANIES, a Utah corporation, dba THE HAWS COMPANIES REAL ESTATE SERVICES, ROBERT M. WEST, JR. and JOHN DOES 1 through 4, Defendants.	JUDGMENT AGAINST RICHARD M. KNAPP PURSUANT TO JURY VERDICT Civil No. 930400136 Hon. James R. Taylor

Pursuant to the Special Verdicts of the jury in this matter returned on February 28, 2000, the Court enters the following Judgment:

Judgment in favor of Plaintiff and against Defendant Richard M. Knapp for fraud in the amount of $71,336.00, together with interest thereon from June 25, 1992 until the date of this Judgment, March 29, 2000, in the amount of $55,386.86, and interest after the date of this Judgment at the rate of 7.670 percent per annum. Mr. Knapp's liability for this amount is joint and several with the liability for fraud of Defendants

Gilbert R. Turner, University Properties, Inc. and The Haws Companies.

Judgment in favor of Plaintiff and against Defendant Richard M. Knapp for negligence in the amount of $73,500.00, together with interest thereon after the date of this judgment at 7.670 percent per annum.

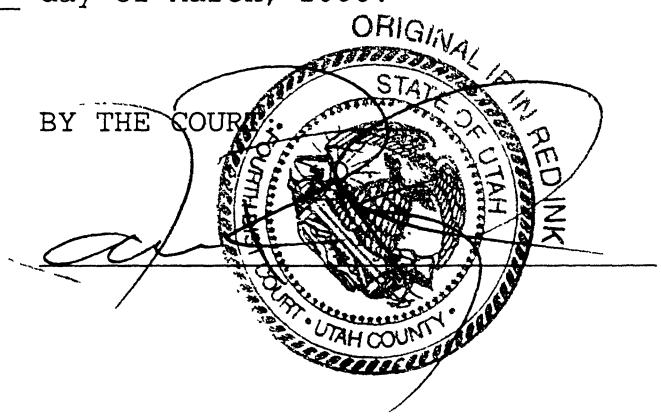
While the jury returned a verdict in favor of Plaintiff and against Defendant Richard M. Knapp for violation of Utah Code Annotated § 61-2-11 in the amount of $60,946.00, Plaintiff elected punitive damages rather than the statutory penalty; therefore, no judgment is entered on this amount.

Judgment in favor of Plaintiff and against Defendant Richard M. Knapp for punitive damages in the amount of $1,750,000.00 together with interest thereon after the date of this judgment at 7.670 percent per annum.

Costs in the amount of $_____.

DATED this 29 day of March, 2000.

BY THE COURT:



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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

DIVERSIFIED HOLDINGS CO., L.C., Plaintiff, v. GILBERT R. TURNER, RICHARD M. KNAPP, UNIVERSITY PROPERTIES, INC., a Utah corporation, THE HAWS COMPANIES, a Utah corporation, dba THE HAWS COMPANIES REAL ESTATE SERVICES, ROBERT M. WEST, JR. and JOHN DOES 1 through 4, Defendants.	JUDGMENT AGAINST THE HAWS COMPANIES PURSUANT TO JURY VERDICT Civil No. 930400136 Hon. James R. Taylor

Pursuant to the Special Verdicts of the jury in this matter returned on February 28, 2000, the Court enters the following Judgment:

Judgment in favor of Plaintiff and against Defendant The Haws Companies for fraud in the amount of $71,336.00, together with interest thereon from June 25, 1992 until the date of this Judgment, March 29, 2000, in the amount of $55,386.86, and interest after the date of this Judgment at the rate of 7.670 percent per annum. The Haws Companies' liability for this amount is joint and several with the liability for fraud of Defendants

Gilbert R. Turner, Richard M. Knapp and University Properties, Inc.

Judgment in favor of Plaintiff and against Defendant The Haws Companies for negligence in the amount of $52,500.00, together with interest thereon after the date of this judgment at 7.670 percent per annum.

While the jury returned a verdict in favor of Plaintiff and against Defendant The Haws Companies for violation of Utah Code Annotated § 61-2-11 in the amount of $4,200.00, Plaintiff elected punitive damages rather than the statutory penalty; therefore, no judgment is entered on this amount.

Judgment in favor of Plaintiff and against Defendant The Haws Companies for punitive damages in the amount of $130,500.00 together with interest thereon after the date of this Judgment at the rate of 7.670 percent per annum.

Costs in the amount of _____.

DATED this 29 day of March, 2000.

BY THE COURT:

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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

DIVERSIFIED HOLDINGS CO., L.C., Plaintiff, v. GILBERT R. TURNER, RICHARD M. KNAPP, UNIVERSITY PROPERTIES, INC., a Utah corporation, THE HAWS COMPANIES, a Utah corporation, dba THE HAWS COMPANIES REAL ESTATE SERVICES, ROBERT M. WEST, JR. and JOHN DOES 1 through 4, Defendants.	JUDGMENT AGAINST UNIVERSITY PROPERTIES, INC. PURSUANT TO JURY VERDICT Civil No. 930400136 Hon. James R. Taylor

Pursuant to the Special Verdicts of the jury in this matter returned on February 28, 2000, the Court enters the following Judgment:

Judgment in favor of Plaintiff and against Defendant University Properties, Inc. for fraud in the amount of $71,336.00, together with interest thereon from June 25, 1992 until the date of this Judgment, March 29, 2000, in the amount of $55,386.86, and interest after the date of this Judgment at the rate of 7.670 percent per annum. University Properties, Inc.'s liability for this amount is joint and several with the liability

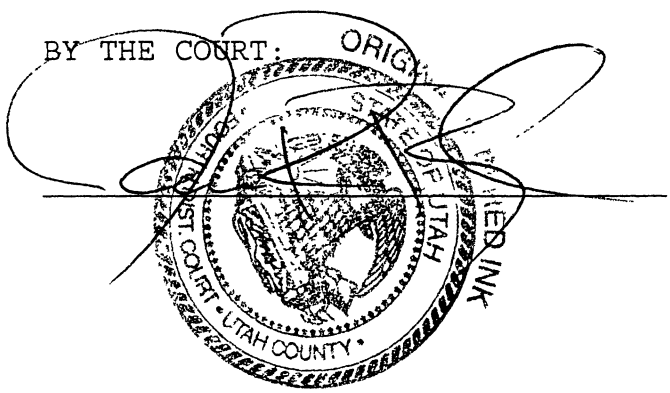
for fraud of Defendants Gilbert R. Turner, Richard M. Knapp and The Haws Companies.

Judgment in favor of Plaintiff and against Defendant University Properties, Inc. for punitive damages in the amount of $1,000,000.00 together with interest thereon after the date of this Judgment at the rate of 7.670 percent per annum.

Costs in the amount of $_____.

DATED this 29 day of March, 2000.

BY THE COURT:



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Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

UTAH COUNTY, STATE OF UTAH

DIVERSIFIED HOLDINGS CO., L.C., Plaintiff, v. GILBERT R. TURNER, RICHARD M. KNAPP, UNIVERSITY PROPERTIES, INC., a Utah corporation, THE HAWS COMPANIES, a Utah corporation, dba THE HAWS COMPANIES REAL ESTATE SERVICES, ROBERT M. WEST, JR. and JOHN DOES 1 through 4, Defendants.	JUDGMENT AGAINST GILBERT R. TURNER PURSUANT TO JURY VERDICT Civil No. 930400136 Hon. James R. Taylor

Pursuant to the Special Verdicts of the jury in this matter returned on February 28, 2000, the Court enters the following Judgment:

Judgment in favor of Plaintiff and against Defendant Gilbert R. Turner for fraud in the amount of $71,336.00, together with interest thereon from June 25, 1992 until the date of this Judgment, March 29, 2000, in the amount of $55,386.86, and interest after the date of this Judgment at the rate of 7.670 percent per annum. Mr. Turner's liability for this amount is joint and several with the liability for fraud of the Defendants

Richard M. Knapp, University Properties, Inc. and The Haws Companies.

Judgment in favor of Plaintiff and against Defendant Gilbert R. Turner for negligence in the amount of $84,000.00, together with interest thereon after the date of this judgment at 7.670 percent per annum.

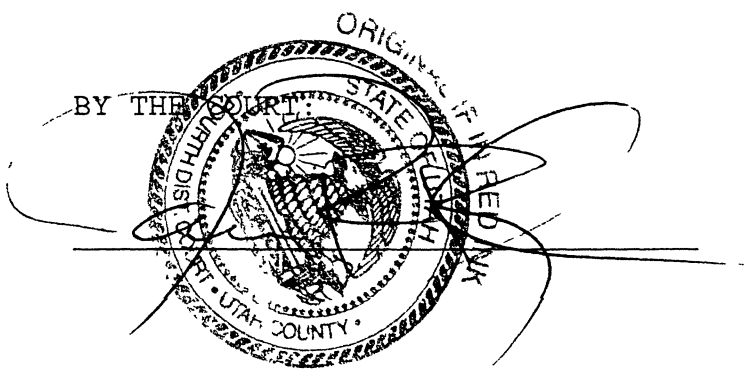
While the jury returned a verdict in favor of Plaintiff and against Defendant Gilbert R. Turner for violation of Utah Code Annotated § 61-2-11 in the amount of $41,502.00, Plaintiff elected punitive damages rather than the statutory penalty; therefore, no judgment is entered on this amount.

Judgment in favor of Plaintiff and against Defendant Gilbert R. Turner for punitive damages in the amount of $2,250,000.00 together with interest thereon after the date of this judgment at 7.670 percent per annum.

Costs in the amount of _____.

DATED this 29 day of March, 2000.

BY THE COURT:



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Tab B

IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

DIVERSIFIED HOLDING CO. L C, Plaintiff, vs. GILBERT R. TURNER, et al, Defendant.	Case No. 930400136 CV Partial transcript

Jury Trial
Electronically Recorded on
February 25, 2000

BEFORE: THE HONORABLE JAMES R. TAYLOR
Fourth District Court Judge

For the Plaintiff:

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Telephone: (801)373-6345

Transcribed by: Beverly Lowe RPR/CSR/CCT

1771 SOUTH CALIFORNIA AVENUE
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TELEPHONE: (801)377-0027

MR. ATKIN: Even if its principal is also liable. I don't want the jury to be confused.

THE COURT: We're beyond that.

MR. ATKIN: We do have the instruction that the principal is liable.

THE COURT: Thirty-five is the instruction on agency. Principal is liable, and you want me to say in addition that an agent is liable?

MR. ATKIN: An agent is also liable for his tortious conduct--

UNIDENTIFIED: Even if the principal is also liable.

THE COURT: Okay.

UNIDENTIFIED: I have a copy if you want to go through it.

THE COURT: Yeah, why don't you bring that to me and I'll add it to 35.

Mr. Smith, are you with us? We're talking about adding on instruction 35, we'll simply add the sentence -- this is the agency instruction, and we add the sentence, "An agent is personally liable for his tortious conduct, even if his principal is also liable." That is the law.

MR. SMITH: I don't have a problem.

THE COURT: Okay.

MR. ATKIN: And then, your Honor, the instruction an integration clause of the contract between the parties does not

(inaudible) fraud or negligent misrepresentation or is reading of the integration clause to the jury. I think we need this instruction that the integration clause is not barred (inaudible) negligent misrepresentation.

THE COURT: Well, the reason I didn't put that in is because it's a law relating to the admission of proof. The proof is in. It governs me, it doesn't govern the jury. I put the evidence in.

MR. ATKIN: The proof is in, your Honor, but I wouldn't want to hear in closing argument that because there was this integration clause my clients are precluded from being able to prove fraud.

MR. SMITH: I won't make the argument.

MR. ATKIN: Well, I don't (inaudible) the jury to -- because they had that read to them, I wouldn't want them to mistakenly conclude because there's an integration clause--

THE COURT: What you really want me to say is you want me to tell them that because there's an integration clause it doesn't mean that it can't be fraud or (inaudible).

MR. ATKIN: That's correct.

THE COURT: You don't want me to say there can't be proof of -- okay.

MR. ATKIN: That will be fine. Something that--

THE COURT: Okay, an integration clause in the contract between the parties does not bar recovery for?

MR. ATKIN: Or fraud or misrepresentation.

MR. SMITH: If they understand (inaudible).

THE COURT: Okay, I'll do that. Where do you want it? Where do you want it in the instructions, what do you think (inaudible)?

MR. ATKIN: After the fraud instructions.

THE COURT: Okay, right before negligence?

UNIDENTIFIED: So between 42 and 43.

THE COURT: Okay. Let's look at the verdict form for just a minute. As I went through this I just spaced out I didn't include University Properties as a defendant. I should have done that. Not in every cause of action.

MR. SMITH: And likewise, Judge, the fraud cause of action is not against the Haws Company West, it's against Gilbert Turner, and there is a claim that Knapp and University Properties ratified the fraud, and therefore would be liable.

THE COURT: Okay.

MR. SMITH: So I believe that there has to first be a finding that Turner committed fraud, secondly there has to be a finding that Knapp ratified the fraud, that University Properties ratified--

THE COURT: I think you're correct, but I think you need instructions to say that. I think that's included in the instructions, and for them to come to a conclusion that a plaintiff is entitled to recover on a claim of fraud, that's

REPORTER'S CERTIFICATE

STATE OF UTAH)
)
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That the foregoing proceedings were transcribed under my direction from the electronic tape recording made of these proceedings.

That this transcript is full, true, and correct and contains all of the evidence, all of the objections of Counsel and rulings of the Court and all matters to which the same relate which were audible through said tape recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 6th day of August 2001.

My commission expires:
February 24, 2004

NOTARY PUBLIC
residing in Utah County

BEVERLY A. LOWE
NOTARY PUBLIC • STATE of UTAH
1771 SOUTH CALIFORNIA AVE.
PROVO, UT 84606
COMM EXP 2-24-2004

Tab C

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

Diversified Holdings Co., L.C.,	:	
Plaintiff	:	Memorandum Decision
vs.	:	Date: June 8, 2000
Gilbert R. Turner, et. al.,	:	Case Number: 930400136
Defendant	:	Division V: Judge James R. Taylor

This matter comes before the Court on the motion of Defendants Richard M. Knapp, University Properties, Inc. and The Haws Companies for a new trial or, in the alternative, a remittitur of damages. Those three Defendants have asked that the motion be extended to include the judgment against the additional Defendant Gilbert R. Turner which was allowed by this Court. The Defendants do not challenge, by this motion, the jury verdict except as to separate damages for negligence, an apparent award of damages for interest on money loaned to the Plaintiff by Defendant Richard Knapp in connection with the subject transaction and the amount of punitive damages awarded.

Rule 59(a)(6) of the Utah Rules of Civil Procedure allows a verdict to be set aside if there is insufficient evidence to sustain the verdict. "A trial court cannot grant a new trial if there is sufficient evidence to support a verdict for either party and the judge merely disagrees with the judgment of the jury. Mere disagreement is not a sufficient basis on which to set aside a verdict and order a new trial," Crookston v. Fire Insurance Exchange, 817 P.2d 189 at 799 (Utah, 1991).

A trial court may set aside a verdict and grant a new trial when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice, Id. at 803.

The Utah Supreme Court has noted, in Crookston, supra at 813 that:

> A trial judge, in proposing a remittitur or additur, only does so as an alternative to granting a new trial. This is true because a trial judge may only remit the damages if he or she finds them excessive or add to them if he or she finds them inadequate–which is one of the grounds for granting a new trial. Thus, if a plaintiff does not want to accept the proposed remittitur, he or she may elect to retry the matter.

In considering a challenge to a jury verdict on the basis of insufficient evidence under Rule 59(a)(6) of the Utah Rules of Civil Procedure this Court must construe the evidence in favor of the verdict. In this case the jury was asked to determine if there was fraud and/or negligent misrepresentation. They were also instructed and asked to determine if the defendants had breached a standard of care under a simple negligence theory. Both questions were answered affirmatively. Those conclusions are not challenged by this motion. The jury then determined that damages of $71,336.00 resulted from the fraud and/or negligent misrepresentation. The next question put to the jury asked them to ". . . state the amount of additional damages, if any, sustained by the plaintiff as a proximate result of the negligence" (Emphasis added).

As this Court views the evidence, the fundamental fraud claim was that the defendants lied and misrepresented the price Mr. Knapp or his corporation, Defendant University Properties, paid for the property being sold to the Plaintiff and they lied about, misrepresented or hid the nature of

their interest and role in the transaction. Such behavior could certainly have been characterized as simple negligence, as well. However, Mr. Parrish testified that he expected to pay much less for the building than he did. He was shocked and surprised at the final number but, by then, felt compelled to complete the deal because he had committed $70,000.00 at the insistence of Mr. Turner. His estimate of the proper purchase price was first stated at $600,000.00 to $700,000.00 then revised to $650,000.00 to $700,000.00.

The negligence, apart from the outright misrepresentation, that occurred in this case resulted in the failure of the defendants to professionally represent the Plaintiff as real estate professionals to obtain the most reasonable price possible for the property. Stated differently, this jury could have concluded that had the defendants acted professionally, they might have negotiated the price Mr. Parrish expected, resulting in a purchase price of $650,000.00 instead of $785,000.00. That is a difference of $135,000.00. Of that, $70,000.00 was the inflated amount created by the misrepresentation and fraud. $1,336.00 exactly corresponds to the interest or fee charged on the loan for $50,000.00 which the Plaintiff argued and the jury apparently found to be another fraudulent scheme. The remaining difference in purchase price would then be $65,000.00. There was no other evidence of damage presented or argued to the jury. The jury award of $210,000.00 for "additional damages, if any, sustained by the plaintiff as a proximate result of the negligence" cannot, therefore be sustained beyond the amount of $65,000.00. Accordingly, a remittitur to the award for negligence in the amount of $145,000.00 will be

allowed to bring the total amount awarded as damages for negligence to $65,000.00.

Rule 59(a)(5) of the Utah Rules of Civil Procedure provides that a trial court can also grant a new trial if the damages awarded are "excessive [in amount] . . . appearing to have been given under the influence of passion or prejudice." In Crookston, supra, the Utah Supreme Court created a presumption that if the ratio of punitive damages to actual damages exceeds a specified ratio, they are excessive and must be supported by specific findings of the trial court to be sustained.

> Any motion for a new trial on the question of punitive damages requires that the trial court engage in a two-part inquiry: (i) whether punitives are appropriate at all, i.e. whether the evidence is sufficient to support a lawful jury finding of defendant's requisite mental state, . . . and (ii) whether the amount of punitives is excessive or inadequate, appearing to have been given under the influence of passion or prejudice. Id. at 807.

The Defendants do not challenge the verdict under part i of the Crookston process. They rely, in total, upon the ratio of damages awarded to punitive damages to support their claim that the punitive damages are excessive.

Seven factors have been outlined to be considered in assessing the amount of punitive damages including: 1) the relative wealth of the defendant, 2) the nature of the alleged misconduct, 3) the facts and circumstances surrounding such conduct, 4) the effect thereof on the lives of the plaintiff and others, 5) the probability of future recurrence of the misconduct, 6) the relationship of the parties and, 7) the amount of actual damages awarded. The damages awarded against each of the Defendants will be considered in the framework of the seven identified factors.

Gilbert R. Turner

The jury awarded damages against Mr. Turner as follows:

Fraud or negligent misrepresentation:	$71,336.00
Additional damages as a proximate result of negligence:	$26,000.00
Money received through violation of UCA 61-2-11	$ 41,502.00
Punitive Damages	$2,250,000.00

The damages awarded for fraud or negligent misrepresentation are joint and several with the other defendants. The additional damages proximately resulting from negligence are apportioned from a total of $65,000.00, reduced from the verdict amount as noted above. After receiving the verdict the Plaintiffs elected to receive punitive damages rather than an award based upon the money received through a violation of U.C.A. section 61-2-11. Interest accrues on the various amounts at the statutory rate of interest (7.670% per annum).

I. Relative Wealth of Richard Turner

The Utah Supreme Court identified, as the first factor to be considered, the "relative wealth of the Defendant." Relative to whom? In this case Mr. Turner appears to be the least wealthy of any of the Defendants. No evidence was presented at any time identifying any net worth of Mr. Turner although he was a real estate broker for a substantial time in California before coming to Utah. In California he owned his own business. He appears to have a home in Park City although there was no evidence from which the Court can determine that he owned,

rented or borrowed the property. In the months just preceding the subject transaction in 1992, Mr. Turner got into trouble for appropriating $5,000.00 from a trust account. He borrowed the money to repay the account from Mr. Knapp. Although Mr. Turner appeared on the first day of trial and asserted a need for support and travel expenses to come to the trial, there is no other evidence to support any substantial conclusion about Mr. Turner's wealth, relative to anybody.

II. The Nature of the Misconduct of Richard Turner

Mr. Turner's conduct in this case was core to the fraud that was perpetrated upon the Plaintiff. Mr. Turner drafted the contract for the purchase, by Mr. Knapp, of the subject property from First Security Bank. He then lied to the Plaintiffs by feigning a lack of knowledge about the purchase price from First Security Bank and then pretended to call Mr. Knapp to set the re-sale price to the Plaintiffs at $785,000.00. He did not cooperate with his broker, the Haws Company, to allow adequate supervision. He knew that Mr. Knapp was a licensed agent, having introduced Mr. Knapp to the Haws Company for that purpose and yet he kept that fact away from the Plaintiffs. He took a kick-back fee from a bank to arrange financing for the Plaintiff. He offered and carried out the motions as if to represent the Plaintiff but acted as an agent for Richard Knapp, University Properties and himself, ultimately splitting profits from the resale of the building to the plaintiffs. He plainly lied about the reason for the price by saying that a third party had offered $750,000.00 for the building. He took advantage of the Plaintiff's short term need for cash to close the deal by manipulating a request for money under circumstances any reasonable

person would have interpreted as a desire for a loan at 10% per annum into a loan at 120% per annum. In short virtually all of the deception that occurred in this case was carried out through the lies, statements and activity of Mr. Turner acting by himself or in concert with other defendants.

III. The Facts and Circumstances of the Case

The facts and circumstances of the case, as related to Mr. Turner, are largely described in the preceding paragraph. After committing the Plaintiff to the purchase by obtaining a non-refundable deposit he used the same money to commit First Security Bank to sell to Mr. Knapp thereby insuring substantial profit with little or no cash outlay for himself or Mr. Knapp. He managed to obtain, in addition to a 50% share of the profits from the sale, a real estate commission on both deals and a kickback from the bank providing funding for the Plaintiff. All the while he represented himself to the Plaintiff as their agent.

IV. The Effect Upon the Lives of the Plaintiff and Others

The only evidence received regarding the effect of this transaction upon the Plaintiff was that the profit they subsequently realized was reduced by the amount they were defrauded in the purchase of the building. Nothing regarding the re-sale of the building was presented to the jury. An expert witness testified as to three possible values of the building, all substantially more than either purchase price. However it was demonstrated in cross examination that some of the data relied upon by the appraiser may have been flawed. There was no other evidence of the impact of

this conduct upon the lives of Plaintiffs or others.

V. The Probability of Future Recurrence of the Misconduct

Mr. Turner has surrendered his real estate license. He was the subject of discipline for an earlier indiscretion and appears to be chronically unable to tell the truth. Most witnesses who knew of him indicated that he has a penchant for half truths and misrepresentation. He has been in the real estate business for a substantial period of time. Nevertheless, unless he simply ignores the licensing laws of the State and attempts to act as a broker or agent without a license, it is unlikely that he will be in a situation for this conduct to be repeated. He appears to have no real estate license or position. There is not a high probability of this conduct being repeated by Mr. Turner.

VI. The Relationship of the Parties

Mr. Turner's principal asset appears to be the ability to sell. He was hired and used by Mr. Knapp when Mr. Knapp was concerned that others might not accept him as legitimate because of his age. He ingratiated himself to Mr. Parrish and convinced him of the need to purchase the building and make a profit He befriended Mr. Knapp and appears to have gained the confidence of Richard Haws, even though an investigation into his practices began just before Mr. Haws transferred his license to the Haws Companies. However, other than those relationships in the general business context, there is no evidence in this case of relationships that would impact a punitive damage award.

VII. The Amount of Actual Damages Awarded

In comparing the damages awarded to the amount of punitive damages the Supreme Court in the second Crookston case, 860 P.2d 937 at 940 (1993) noted that "[s]oft compensatory damages, "which must be awarded with caution," . . . are not to be given equal weight with hard compensatory damages when evaluating the relationship between punitive and compensatory damages." This case did not involve any damages identified as general or resulting from pain and suffering. As noted above, there was not evidence on that point. The Plaintiff was led to believe that they were purchasing the building for $15,000 more than Mr. Knapp had paid for the building, repaying his $5,000.00 "unrefundable" payment for the option and allowing a $10,000.00 profit. Mr. Parrish expected to pay much less for the building, estimating the value at $650,000.00 to $700,000.00. There was testimony that the $5,000.00 was returned to Mr. Turner by the bank when he delivered the $70,000.00 obtained from the Plaintiff. Mr. Knapp said he never received the money and no other explanation of what happened to that money was presented.

The verdict form required the jury to determine, first, if the Defendants committed the torts of fraud and negligent misrepresentation. It called for a determination of an amount that would reasonably compensate the Plaintiff for the injury caused. That amount was set by the jury at $71,336.00. The jury was then asked to apportion the simple negligence among the defendants Mr. Turner, Mr. Knapp, Mr. West and the Haws Companies, all of whom were real estate

professionals. Mr. Turner's responsibility was set at 40%. Since the damage resulting from negligence has been remitted to a reasonable measure of the actual cost of the unprofessional representation, the negligence damages are considered to be "hard." Interest accumulated since the date of judgment accrues after the judgment was entered and was not determined by the jury. Consequently, it cannot be considered in reviewing the jury verdict to determine if the award was reasonable. The Plaintiff elected to not receive any award resulting from the statutory violation. That leaves, for Mr. Turner, a total of $97,336.00 in compensatory damages to be compared to punitive damages of $2,250,000.00. The ratio is approximately 1 to 23.

Summary: Gilbert R. Turner

To review the 7 Crookston factors: 1) There is no evidence from which the jury or this Court can conclude anything about the relative wealth of Mr. Turner; 2) Mr. Turner's conduct was substantially egregious and core to the fraud that was perpetrated upon the Plaintiff; 3) Mr. Turner manipulated and took advantage of the circumstances to carry out the fraud; 4) there was no evidence of substantial impact upon the lives of the Plaintiff or others; 5) there is a low probability that Mr. Turner will engage in this sort of conduct in the future because there is no evidence that he will have any opportunity to do so, 6) there was no evidence of unusual or sensitive relationships other than created in a business environment related to this fraud, and, 7) the ratio of compensatory damages to punitive damages, 1 to 23, is extreme.

With regard to Mr. Turner, this Court concludes that punitive damages of $2,250,000.00

is extreme and unnecessarily high. The amount clearly exceeds the proper ratio established by the Supreme Court for punitive damages. The evidence of Mr. Turner's knowledge and malice was substantial. The actions were certainly not benign. There is no evidence, one way or the other, as to whether the award would risk bankrupting Mr. Turner although a man who demands car fare to come to court would probably have a difficult time paying well over two million in damages. Even though the Plaintiff elected to not receive compensation from the violation of the statute governing conduct of real estate agents, that statute would have allowed a penalty of up to three times the compensation received by virtue of the tainted conduct. The jury determined that compensation to be $41,502.00 for Mr. Turner. The possible penalty would have been $124,506.00. A 1 to 3 ratio, as approved by the Supreme Court from compensatory damages would put punitive damages at $292,008.00. This Court is satisfied, primarily because Mr. Turner is unlikely to have an opportunity to repeat this conduct, that an appropriate penalty is somewhere between those amounts. Accordingly, this Court will authorize a remittitur to the punitive damages portion of the award against Mr. Turner of $2,041,743.00 resulting in a total punitive damage award of $208,257.00.

Richard M. Knapp

The jury awarded damages against Mr. Knapp as follows:

Fraud or negligent misrepresentation:	$71,336.00
Additional damages as a proximate result of negligence:	$22,750.00

Money received through violation of UCA 61-2-11	$ 60,946.00
Punitive Damages	$1,750,000.00

The damages awarded for fraud or negligent misrepresentation are joint and several with the other defendants. The additional damages proximately resulting from negligence are apportioned from a total of $65,000.00, reduced as noted above. After receiving the verdict the Plaintiffs elected to receive punitive damages rather than an award based upon the money received through a violation of U.C.A. section 61-2-11. Interest accrues on the various amounts at the statutory rate of interest (7.670% per annum).

I. The Relative Wealth of Richard Knapp

As a contrast to Mr. Turner, Mr. Knapp appears to be the most wealthy of any of the Defendants. Expert testimony placed his net worth at more than five million, estimated conservatively. He testified that he closed on the purchase of a 311 unit apartment building five months after the deal with the Plaintiffs which was a 16.5 million dollar deal requiring a million dollars down. Although he told Mr. Turner that he couldn't or wouldn't pay the $70,000.00 down if the Plaintiff didn't, he testified that he had access to that amount of cash and now regularly makes real estate loans for which he charges a 10% fee plus 18% per annum. He testified that he currently owns more than 1,000 rental units in three states. When the transaction with the Plaintiff was done Mr. Knapp, although a full time law student and MBA candidate at BYU, owned a 96 unit rental property, two convenience stores, a circuit board manufacturing

company and the building used by University Properties. He was and is a 90% owner of University Properties.

The principal parties for the Plaintiff were not poor men. Wes Parrish was CEO of Parish Chemical, a company he founded and principally owns. He owns or was involved with 6 other companies and had substantial business experience. His partner, Don Wooley, had substantial experience as a scientist for a series of major corporations. He invented the "FLAIR" pen for Papermate. He worked for McDonald-Douglas and Hercules Corp. although, by his own admission, had not made money in those positions. Mr. Wooley felt he had made money in real estate. Through his deposition he established that he had bought and sold several residences, a duplex, a four-plex and a six-plex. At the time of his deposition he owned a home and a condominium in Santa Clara. He felt he had cash to contribute to the Plaintiff to put together this purchase although his inability to obtain $50,000.00 of the funds needed by the time for closing led to the need to borrow that amount from Mr. Knapp.

II. The Nature of the Misconduct of Mr. Knapp

Mr. Knapp, while attending law and business school at BYU became heavily involved in the purchase, sale and management of real property. In an effort to avoid paying real estate commissions, he obtained a real estate sales license. Out of a desire to "put in the time" to make it possible to obtain a broker's license, he "hung his license" with the Haws Companies but affirmatively avoided training or supervision. He negotiated an unusually favorable commission

split with the Haws Companies specifically including in the contract that he would maintain a "branch office" in Provo. The commission split was claimed by him and honored by the Haws Companies. This Court concludes that the balance of the contract was in force and that Mr. Knapp made his University Properties office available for the use of Mr. Turner and the Haws Companies pursuant to that agreement.

Mr. Knapp was the first of any of the parties to notice that the Temple View Terrace property was for sale in April of 1992. He had utilized Mr. Turner on an unspecified number of previous deals because Mr. Turner gave credibility to his position. Mr. Turner was older, presented himself well and gave an impression of confidence and maturity. Mr. Knapp was a 26 year old student who had done very well in real estate development but, frankly, looked his age. Mr. Knapp instructed Mr. Turner to obtain information about the building. Mr. Knapp reviewed the information and determined that it was a distressed sale and felt he could make money by purchasing the property. He approved the earnest money offer to purchase from First Security Bank that was prepared by Mr. Turner. He also directed and approved the sale to the Plaintiff. He met with Mr. Parrish on the site and did not disclose that he was an agent with the same agency as Mr. Turner or that he had a partnership to share in the proceeds from the sale of the building to the Plaintiff. He created artificial pressure on Mr. Turner by telling him that he would not pay the $70,000.00 down payment to First Security Bank requiring Mr. Turner to take whatever steps were possible to commit the Plaintiff to paying the money. When Mr. Knapp

learned that Mr. Turner had been untruthful, instead of acting promptly to rectify the mis-understanding or instructing Mr. Turner to tell the truth, he did nothing but hope the Plaintiff didn't discover the truth. Mr. Knapp affirmatively instructed the title company on the day both deals closed to keep the purchase price paid for the property from the Plaintiff. Mr. Knapp knew the nature of the deal. He created or approved of the structure and benefitted from it.

III. The Facts and Circumstances Surrounding the Conduct

The facts and circumstances with regard to Mr. Knapp are substantially the same as described above as relating to Mr. Turner or implicit from the recitation of the conduct of Mr. Knapp.

IV. The Effect of the Misconduct on the Lives of the Plaintiff or Others

Mr. Turner has, perhaps appropriately, lost his ability to continue in his vocation as a real estate professional because he found himself used and manipulated by Mr. Knapp. By contrast, the loss of the status as "real estate professional" will have little or no impact upon Mr. Knapp since he always has viewed the designation as a convenience or sideline and not his principal vocation. As noted above, the Plaintiff has suffered an economic loss by being required to pay more for the building than they should have with the misconduct of Mr. Knapp.

V. The Probability of Future Recurrence of the Misconduct

The evidence leads this Court to a substantial concern in this area with regard to Mr. Knapp. He has created a large net worth in a short time through real estate investment and

dealing. He demonstrated an incredibly arrogant and uncaring attitude on the stand when asked about the lies and half-truths propounded by Mr. Turner as his behest. In spite of his training as a real estate professional, completion of law school and a degree in business administration he appears to be perfectly willing to place an opportunity for personal profit ahead of ethical fair dealing. Once the jury in this case had determined that punitive damages were warranted by the evidence, he absented himself from the proceedings. He was not present during evidence or argument related to the proper amount of punitive damages. That behavior was not lost on the jury or the Court. This Court concludes that unless Mr. Knapp changes his conduct and attitude that a very real possibility exists that Mr. Knapp will seek and exploit circumstances such as this on a future occasion.

VI. The Relationship of the Parties

Mr. Parrish was and is an experienced scientist and businessman. Mr. Wooley considered himself knowledgeable in real estate matters but, particularly in comparison with the Defendants, was also relatively inexperienced. He noted that he relied upon real estate professionals, accountants and lawyers when dealing in such matters. Mr. Knapp had or was receiving substantial training about the intricacies of real estate transactions. Mr. Turner was a very competent salesman capable of being manipulated by Mr. Knapp. The Haws Companies were perfectly willing to associate Mr. Knapp and Mr. Turner to benefit through commissions from the real estate business Mr. Knapp was involved in and from having a "presence" in the Provo area

through a branch office but not in providing substantive training and supervision. These relationships combined to make the fraud established in this case possible. Mr. Knapp, in particular, fostered and took advantage of relationships with co-defendants for his own particular profit.

VII. The Amount of Actual Damages Awarded

The jury concluded that damages attributable to Mr. Knapp included $71,336.00 from the fraud/negligent misrepresentation. The negligence damages have been reduced by this decision to $22,750.00. Punitive Damages against Mr. Knapp totaled $1,750,000.00. Following the computation explained for Mr. Turner, above, the totals are $94,086.00 to $1,750,000.00 for a ratio of about 1 to 19.

Summary: Richard Knapp

To review the 7 Crookston factors regarding Mr. Knapp: 1) Mr. Knapp is most likely the most wealthy of any of the parties (although there was no evidence from which the Court can conclude the net worth of Mr. Parrish or Mr. Wooley). 2) Mr. Knapp knowingly initiated and took advantage of the full scheme to defraud the Plaintiff. His conduct was extensive and egregious. 3) The circumstances surrounding the conduct were manipulated and utilized by Mr. Knapp to facilitate the fraud. 4) The Plaintiff was forced to spend more on the property than it wanted. Mr. Turner, who certainly was not blameless, ended up unable to engage in a profession that appears to have been his main vocation for some time. Mr. Knapp and his general business

interests, except for the impact of this judgment, are largely unaffected. 5) Unless forced to change his business practices and outlook there is a substantial possibility that Mr. Knapp will seek and take advantage of similar circumstances in the future. 6) Mr. Knapp accomplished much of the fraud in this case by creating and manipulating special relationships–particularly with other defendants. 7) Damages awarded by the jury as compared to punitive damages were in a ratio of about 1 to 19 which substantially exceeds the Supreme Court guidelines.

The punitive damage award exceeded the proper ratio but Mr. Knapp's behavior was knowing and active. He does not run a substantial risk of bankruptcy from the damages awarded. Because Mr. Knapp's behavior was so key to this scheme and because of the need to create a disinclination for such conduct to be repeated, this Court concludes that although punitive damages in the amount awarded by the jury are excessive, the damages should exceed the 1 to 3 ratio guideline established by the Supreme Court. This Court concludes that punitive damages in the amount of $500,000.00 are reasonable and just. His total judgment, in that circumstance, would be approximately 10% of his conservative net worth. This is not an amount intended to bankrupt but, instead, to send a very strong message regarding future conduct. A remittitur, then, of $1,250,000.00 will be authorized to reduce the punitive damage award against Mr. Knapp to $500,000.00.

University Properties

The jury awarded damages against University Properties as follows:

Fraud or negligent misrepresentation:	$71,336.00
Punitive Damages	$1,000,000.00

The damages awarded for fraud or negligent misrepresentation are joint and several with the other defendants.

I. Relative Wealth of University Properties

There was no evidence of the relative value of University Properties. Richard Knapp is or was a 90% owner of the company and it is presumed that the value of the company is included in the assessment of his net worth.

II. The Nature of the Alleged Misconduct of University Properties

As the jury was instructed, a corporation may only act through it's agents. In this case Richard Knapp took actions attributable to University Properties when he cause the company to purchase the property from First Security Bank and then almost immediately re-sell the property to the Plaintiffs making a fraudulent profit (and, at the same time, earning a real estate commission for Mr. Knapp). There was no testimony or evidence of any corporate act of University Properties taken by any person other than Mr. Knapp.

III. The Facts and Circumstances Surrounding the Conduct

There is nothing regarding facts and circumstances related to University Properties that differs from the explanation given above for Mr. Knapp.

IV. The Effect on the Lives of the Plaintiff and Others

Any impact upon other persons by the actions attributable to University Properties is explained above under the section for Mr. Knapp.

V. The Probability of Future Recurrence of the Misconduct

As noted above, without substantial penalty and intervention, Mr. Knapp is likely to seek and utilize additional opportunities for fraud. University Properties is a company that Mr. Knapp has utilized for his real estate activities in the past. Although the most important rehabilitative impact of punitive damages will be upon Mr. Knapp, himself, the corporation has also misbehaved through Mr. Knapp and should bear some of the responsibility. The Court notes, in particular, that Mr. Knapp made careful distinction between activities he took as an "agent" and activities of the corporation such as purchase and sale of the building.

VI. The Relationship of the Parties

Except to re-state that University Properties is completely dominated and controlled by Mr. Knapp and to refer to the relationships section for Mr. Knapp, no additional evidence on this point was presented at trial.

VII. The Amount of Actual Damages Awarded

The ratio of compensatory damages to punitive damages for University Properties was 1 to 14.

Summary: University Properties

In reviewing the Crookston factors with regard to University Properties, it is difficult and

not particularly helpful to separate the corporation from the conduct of Richard Knapp. While there was no evidence to justify piercing the corporate veil and disregarding that corporate entity, the misbehavior of the corporation completely resulted from the mis-deeds of Mr. Knapp. The is some need for a message of rehabilitation to be given to the company but not at a ratio to compensatory damages of 14 to 1. This Court concludes that punitive damages to the corporation in the approved ratio of 3 to 1, or $214,000.00 is more reasonable. Accordingly, a remittitur to the punitive damages judgment against University Properties of $786,000.00 will be allowed to reduce the total punitive damage award against that corporation to $214,000.00.

The Haws Companies

The jury awarded damages against The Haws Companies as follows:

Fraud or negligent misrepresentation:	$71,336.00
Additional damages as a proximate result of negligence:	$16,250.00
Money received through violation of UCA 61-2-11	$ 4,200.00
Punitive Damages	$130,500.00

The damages awarded for fraud or negligent misrepresentation are joint and several with the other defendants. The additional damages proximately resulting from negligence are apportioned from a total of $65,000.00, reduced as noted above. After receiving the verdict the Plaintiffs elected to receive punitive damages rather than an award based upon the money received through a violation of U.C.A. section 61-2-11. Interest accrues on the various amounts at the

statutory rate of interest (7.670% per annum).

The ratio of compensatory damages to punitive damages, consistent with the analysis already employed, is about 1 to 1.5 ($87,586.00 to $130,500.00). The punitive award represents exactly 25% of the net worth established for the Haws Companies by expert testimony which is also the percentage of responsibility for the total negligence determined by the jury. The ratio is well within the established Supreme Court no further analysis of the award is necessary. Nevertheless, a brief review of the Crookston factors relative to the Haws Company may also be valuable in the event this award is considered.

I. The Relative Wealth of the Haws Companies

All that can be said of the Haws Companies' relative wealth is that the company is worth less than Mr. Knapp. The company had an office in Salt Lake, wanted an office in Provo and, for a time, managed a development near Mr. Knapp's office in Provo. None of that informs as to the relative wealth of the Haws Companies. The company's net worth was $522,000.00.

II. The Nature of the Alleged Misconduct

The Haws Companies, through it's owner Mr. Haws, hired Mr. Turner in spite of a somewhat checkered status with the State of Utah. They allowed Mr. Knapp to "hang his license" solely to gain time but not to foster, train and guide as a real estate agent moved to becoming a real estate broker. They were willing to associate with him to collect fees and participate in his real estate business as a principal. When confronted with the misconduct their

most significant response was to demand their share of any commission and fire Mr. Turner and Mr. Knapp. They made no attempt whatsoever to rectify the injustice created by the fraud of their agents.

III. The Facts and Circumstances Surrounding the Conduct

As above, the facts and circumstances surrounding the conduct are largely indistinguishable from the conduct, itself. The simple conclusion is that the Haws Companies neglected to keep the faith with the public they assumed by becoming a real estate brokerage firm. A negligent, distant company combined with aggressive and less than ethical agents resulted in a fraud which they failed to rectify upon discovery.

IV. The Effect on the Lives of the Plaintiff and Others

There is no additional information, beyond that discussed above, about the effect of the conduct of the Haws Companies upon the lives of others.

V. The Probability of Future Recurrence of the Misconduct

The Haws Companies are in the business of dealing in real estate. The company has taken it upon itself to recruit, supervise and train real estate professionals. The company continues to be licensed and regulated by the State of Utah. If allowed to engage in these practices without penalty, the possibility for a recurrence of this or similar type of harm from agents of the Haws Company is certainly possible or likely.

VI. The Relationship of the Parties

As noted above, the Haws Companies allowed itself to be used and manipulated by Mr. Knapp and Mr. Turner to facilitate the fraud perpetrated upon the Plaintiff. The relationship was an important part of the deception used to shield the undisclosed profit. Mr. Turner was in the business of marketing real estate because Haws Company contracted with him for that purpose.

VII. The Amount of Actual Damages Awarded

As noted above, the ratio of compensatory damages to punitive damages is approximately 1 to 1.5.

Summary: The Haws Company

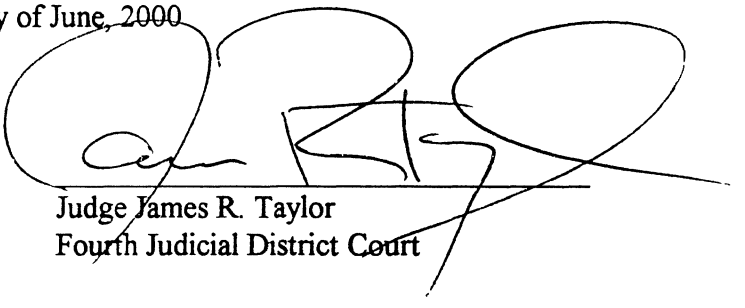
The award in this case does not exceed the approved ratio. Although the conduct of the Haws Companies was, at the time of the actual fraud, relatively benign and without malice, the company did not take advantage of an opportunity to correct an error but, instead acted to protect it's "fee position" by seeking to collect real estate commissions and fire the agents. The award is 25% of the company's net worth making the possibility of bankruptcy from the award remote. This Court concludes that the jury determination of punitive damages against the Haws Company was appropriate and will not authorize a further remittitur of that amount.

Conclusion

In summary, this Court concludes that the evidence available to support an award of damages proximately cause by the negligence of the defendants must be reduced by $145,000.00 to $65,000.00. The fraud damages are supportable by evidence of $70,000.00 increased price

from the misrepresentations and deceit of the defendants and $1,333.00 charged for a loan also created through fraudulent conduct of the defendants. The Court has concluded that punitive damages awarded against Gilbert R. Turner, Richard Knapp and University Properties were excessive. Remittiturs of $2,041,743.00 to the punitive award against Mr. Turner, $1,250,000.00 to the punitive award against Mr. Knapp and $786,000.00 to the punitive award against University Properties are authorized. The award against the Haws Companies is not found to be excessive and no remittitur will be allowed. Counsel for the Defendants is instructed to prepare appropriate modified judgments showing the reduced awards to be submitted to counsel for the Plaintiff for approval as to form. The Plaintiff, as explained in Crookston, supra at note 31 on page 813, may then elect to accept the reduced judgment or re-try this matter against Defendants Gilbert R. Turner, Richard Knapp and University Properties.

Dated this 12th day of June, 2000



Judge James R. Taylor
Fourth Judicial District Court

A certificate of mailing is on the following page.

Diversified Holding Co., Ltd. v. Gilbert R. Turner, et. al.: 930400136. Memorandum Decision of June 12, 2000.

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Mailed this 12 day of June 2000, postage pre-paid as noted above.

Court Clerk